Petition

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NO. 81-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ORALIA MARTINEZ, as next friend
of ROBERTO MORALES,
Petitioners

vs.

DR. M. L. BROCKETTE, as TEXAS
COMMISSIONER OF EDUCATION;
The TEXAS EDUCATION AGENCY;
McALLEN INDEPENDENT SCHOOL DISTRICT;
and RODNEY CATHEY, as Superintendent of
McAllen Independent School District
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

JAMES A. HERRMANN
TEXAS RURAL LEGAL AID, INC.
305 E. Jackson, Suite 206
Harlingen, Texas 78550
(512) 423-3111

Counsel Of Record For
Petitioner

EDWARD J. TUDDENHAM
Of Counsel
November 2, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Does the absolute deprivation of elementary and secondary education deprive a child of fundamental Constitutional Rights?

2. Does Texas Education Code §21.031(d), which defines a person as a non-resident solely because of his motive for establishing residence, create an invalid, irrebuttable presumption of non-residence under Vlandis v. Kline, 412 U.S. 441 (1973)?

3. Can the right to travel enunciated in Shapiro v. Thompson, 394 U.S. 618 (1969), be violated by motivational residency requirements, like Tex. Ed. Code §21.031(d), as well as by durational residency requirements?

4. In order for Tex. Ed. Code §21.031(d) to pass strict scrutiny, must

there be a finding not only that it serves a compelling state interest, but also that no less restrictive alternatives are available to achieve the State's purpose?

PRAYER

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 19, 1981.

TABLE OF CONTENTS

Questions Presented i

Opinion Below 1

Jurisdiction. 1

Statutory Provisions. 2

Statement of Case 3

Reasons For Granting The Writ 8

1. Tex. Ed. Code §21.031(d) Absolutely Deprives American Citizens of Elementary and Secondary Education. 8

2. The Standard of Strict Scrutiny Applied by the Court of Appeals Conflicts with Supreme Court Precedent. 13

3. The Court of Appeals Interpretation of Right to Travel Is Contrary To Supreme Court Precedent. 17

4. The Court of Appeals' Holding That Texas May Irrebutably Presume Non-Residence from Motive For Residence Conflicts with Supreme Court Precedent . . 24

5. This Case is Closely Related to the Issues Which The Court Will Consider in Toll v. Moreno. 32

Conclusion. 35

Appendix [Decision of Court of Appeals] . . . . . App. A

Appendix [Findings of Fact and Conclusions of Law of the District Court] . . . . . App. B

Appendix [Texas Education Code §21.031]. . . . . App. C

CITATIONS

CASES

Besaw v. Affleck, 333 F.Supp. 775 (D.R.I. 1971) 23

Bright v. Beasler, 336 F.Supp. 527 (E.D. Ky. 1971) 16

Brown v. Board of Education, 347 U.S. 483 (1954) 10

Dunn v. Blumstein, 405 U.S. 330 (1972). 14, 24

Edwards v. California, 314 U.S. 160 (1941). 29

Elkins v. Moreno, 435 U.S. 647 (1978). 27

Hawes v. Club Ecuestre El Comandante, 598 F.2d 698 (1st Cir. 1979). 25

Jones v. Helms, 49 U.S.L.W. 4692, 69 L.Ed.2d 118 (June 15, 1981). . . 29

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 18, 20 22, 26 29

Moore v. East Cleveland, 431 U.S. 494 (1977) 22

Morris v. Gilmer, 129 U.S. 315 (1889). 25

Plyler v. Doe, No. 80-1538, prob. juris. noted 49 U.S.L.W. 3824 (May 4, 1981) of Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980). . . . 10, 11

Roe v. Wade, 410 U.S. 113 (1973). . 28

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973). . . . 29, 31

Shapiro v. Thompson, 394 U.S. 618 (1969). 15
17-26
29, 31
33, 34

Shivelhood v. Davis, 336 F.Supp. 1111 (D. Vt. 1971). 16

Starns v. Malkerson, 401 U.S. 985 (1971), aff'g 326 F.Supp. 234 (D.Minn. 1970). 27, 33
34

Texas v. Certain Unnamed Alien School Children, No. 80-1934, prob. juris. noted 49 U.S.L.W. 3930 (June 15, 1981) of In re Alien School Children, 501 F.Supp 544 (S.D. Tex. 1980). 10, 11
12, 34

Toll v. Moreno, No. 80-2178, 50 U.S.L.W. 8215 (Oct. 6, 1981) granting cert. to Moreno v. Univ. of Md., 645 F.2d 217 (4th Cir. 1981). 32, 34

Vlandis v. Kline, 412 U.S. 441 (1973). 16, 32 33

Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164 (1972) 8

Williamson v. Osenton, 232 U.S. 619 (1914). 25

Wyman v. Bowens, 397 U.S. 49 (1970) aff'g Gaddis v. Wyman, 304 F.Supp. 717 (S.D.N.Y. 1969) 18-23

STATUTES

Texas Education Code §21.031(b) . . . 3

Texas Education Code §21.031(c) . . . 2, 3 26

Texas Education Code §21.031(d). . . throughout

OPINION BELOW

The Opinion of the Court of Appeals appears as Arredondo v. Brockette, 648 F.2d 425 (5th Cir. 1981),[1/] and is attached hereto as Appendix A. The Findings of Fact and Conclusions of Law filed by the District Court appear at 482 F.Supp. 212 (S.D. Tex. 1979) and are attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on

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1/ The parties in the Court of Appeals included, in addition to Petitioner, Delia Morales, and Flora Falcon as next friend for Rita Gomez. The Pharr-San Juan-Alamo Independent School District and its superintendent Arturo Guerra were Appellees below, but are not interested parties in this petition. The caption on the cover reflects all parties interested in this petition.

June 19, 1981. Timely petitions for rehearing and rehearing en banc were denied on August 13, 1981. This petition for certiorari was filed within 90 days of that date. Supreme Court jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Texas Education Code

§21.031 Admission

. . . .

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and under 21 years of age at the beginning of the scholastic year if such person or his parent, guardian, or person having lawful control resides within the school district.

(d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools

> separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public school.

The complete text of Tex. Ed. Code §21.031 is attached hereto as Appendix C.

STATEMENT OF THE CASE

Texas provides that all children in the State shall be eligible for free public schooling in the district in which they reside. Tex. Ed. Code §21.031(b). Residence is the only admission requirement applied to children who live with their parents or guardians. Tex. Ed. Code §21.031(c). However, Tex. Ed. Code §21.031(d) requires that children who reside in any other living arrangement not

only prove their residence in the district but their purpose for establishing that residence. If a child in this group has made his home in the school district for the "primary purpose of attending school" he is conclusively presumed to be a non-resident. Tex. Ed. Code §21.031(d). Purpose for establishing residence is not an issue for any other school applicant. This case challenges the facial constitutionality of Tex. Ed. Code §21.031(d).

Petitioner ROBERTO MORALES is a citizen of the United States, although both of his parents are Mexican citizens who may not legally reside in the United States. In 1977, when he was nine years old, it was decided Roberto should attend school in the United States and learn to speak English. His parents were forbidden by law from

accompanying him to the United States because of their status as Mexican citizens. As a result, Roberto moved from his parents home in Mexico to reside with this adult sister ORALIA MARTINEZ in McAllen, Texas. In the fall of 1977 ROBERTO applied for admission to the Respondent McALLEN SCHOOL DISTRICT. The DISTRICT denied him admission pursuant to Tex. Ed. Code §21.031(d) because he had moved to McAllen, Texas for the purpose of attending school. 482 F.Supp. at 213-215. (Record at 50).

Although defined by Tex. Ed. Code §21.031(d) as a non-resident, there is no question that Petitioner's domicile is in McAllen, Texas. The District Court found that he had met fully the residency requirements applied to all

other school applicants. 482 F.Supp. at 214,(finding of fact 7; hereinafter ff. __). ROBERTO has made his home in the McAllen District continuously since 1977 -- even during the year he did not attend school.2/ The School District does not argue that ROBERTO lives outside the District or that his residence is otherwise a sham; the District's only contention is that ROBERTO's residence in the District is motivated by an unacceptable reason, i.e., the desire to attend school. The District continues to deny him admission to school for this

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2/ ROBERTO did not attend school at all during the 1977-1978 year although he continued to reside in McAllen. In the fall of 1978 he paid tuition for one semester which he seeks in damages. Since December 1979, he has attended school pursuant to the District Court's injunction pending appeal. 482 F.Supp. at 214.

reason.3/

Because ROBERTO and his sister are indigent, they cannot afford to pay tuition. As a result, Roberto is absolutely deprived of all opportunity to obtain an education in the United States, and the District Court so found. 482 F.Supp. at 214, 215, (ff. 12, 25). Petitioner filed suit in federal district court in December of 1977 pursuant to 42 U.S.C. §1983 contending that Tex. Ed. Code §21.031(d) on its face denies him equal protection of the law, violates

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3/ There is no contention that §21.031(d) is necessary to assure that all students live with a parent or guardian. Even children living alone will be admitted if they don't have the one proscribed motive. Nor is a minor precluded from establishing a residence for school purposes. Any child living apart from his parents may establish a residence and be admitted to school as long as his motive for doing so is deemed acceptable.

his right to travel, and denies him due process by creating an invalid irrebuttable presumption of non-residence. Jurisdiction was founded on 28 U.S.C. §1343 (1976).

REASONS FOR GRANTING CERTIORARI

1. Texas Education Code §21.031(d) Absolutely Deprives American Citizens of an Education

Thousands of American citizens are born to Mexican national parents.4/ Only by attending school in the United States can these children learn to speak English and develop the understanding

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4/ A U.S. citizen child may have Mexican national parents by virtue of his birth in the U.S. while his parents are temporarily in the country, either with a visa or illegally. Whatever culpability their parents may have, such children may not be treated as less than full citizens because of the legal transgressions of their parents. Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164 (1972).

of this country necessary to meaningfully pursue their American citizenship. However, because their parents are Mexican, these children must choose between living with their parents and migrating to the United States to obtain this vital education. Tex. Ed. Code §21.031(d) is designed specifically to deter such children from migrating to Texas by denying them free admission to the public schools. 482 F.Supp. at 215, 216(ff. 25, 37). As a result, §21.031(d) absolutely deprives Petitioner and thousands of children like him of an education. 482 F.Supp. at 215 (ff. 25, 26). This denial of education is of great importance, not only to the children who it effectively deprives of the benefits of citizenship, but to the society in which this underclass will

live and work as adults. See, Brown v. Board of Education, 347 U.S. 483, 493 (1954); In re Alien School Children Litigation, 501 F.Supp. 544, 596-597 (S.D. Tex. 1980) prob. juris. noted sub nom. Texas v. Certain Unnamed Alien School Children, 49 U.S.L.W. 3930 (June 15, 1981) (No. 80-1934).

This Court has not decided what level of scrutiny must be applied to an absolute deprivation of primary and secondary education. However, the Court will soon hear argument in two other cases which raise that question, Texas v. Certain Unnamed Alien School Children, supra; and Plyler v. Doe, No. 80-1538, prob. juris. noted 49 U.S.L.W. 3824 (May 4, 1981). Because the outcome in those two cases could well have a determinative impact upon this case, the Court should grant certiorari.

Indeed, Alien School Children, Plyler, and this case are closely related. All three arise from Texas' attempt to solve the problem of its underfinanced educational system by excluding from the public schools discrete classes of children living within the borders of the State -- illegal aliens and citizen children of aliens. The statutory form of the exclusion differs, but both statutes depend on the rationale that excluding some children from school will improve the quality of education for those who remain. Compare, Doe v. Plyler, 628 F.2d 448, 459 n.30 (5th Cir. 1980), with Arredondo, supra, 482 F.Supp. at 215-216. The operation of the statutes through a tuition requirement, and the special burden tuition places on indigent students is also the same in both cases.

Compare, Alien School Children, supra, 501 F.Supp. at 570-572, with Arredondo, supra, 482 F.Supp at 215 (ff. 25).

The difference between this case and the alien school children cases is that Petitioner and children like him are United States citizens. Whether or not aliens may be excluded from school because of their illegal status, Petitioner has made his home in Texas as a matter of constitutional right. The Court of Appeals' decision allows Petitioner to exercise that right only if he is willing to give up his claim to the free public education enjoyed by the rest of the children in Texas. This Court should examine Texas' denial of elementary education to a discrete group of American citizens as carefully as it examines the denial of education to illegal aliens.

2. The Standard of Strict Scrutiny Applied by the Court of Appeals Conflicts with Supreme Court Precedent

The Court of Appeals held that §21.031(d) passed strict constitutional scrutiny for the sole reason that, "Texas' interests in enacting the statute are sufficient." 648 F.2d at 428. This holding misstates the strict scrutiny standard and applies it in a manner directly contrary to Supreme Court precedent.

If a statute is to satisfy strict scrutiny this Court requires that it serve a compelling state interest, and that it be a necessary means of achieving that end:

> It is not sufficient for the State to show that durational residency requirements further a very substantial state interest. In pursuing that interest the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity.

> Statutes affecting constitutional rights must be drawn with "precision," NACCP v. Button, 371 U.S. 415, 438 (1963); U.S. v. Robel, 389 U.S. 250, 265 (1967), and must be "tailored" to serve their legitimate objectives. Shapiro v. Thompson, 394 U.S. 618, 631 (1969). And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all it must choose "less drastic means." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

In holding that §21.031(d) passed strict scrutiny, the Court of Appeals did not find that the State's interest was compelling, or that the statute was necessary. In fact, the Court of Appeals' strict scrutiny analysis was entirely quoted from the District Court's opinion -- an opinion which applied the rational basis standard and found only that §21.031(d) was rationally related to a "legitimate" state interest.

The Court of Appeals' failure to find §21.031(d) to be a necessary means of achieving a compelling state interest was more than an error of diction. This Court has held that interests such as those put forward by the School District, although legitimate, are not compelling interests sufficient to withstand strict scrutiny. See, Shapiro v. Thompson, 394 U.S. 618, 633-638. (1969). Even if Texas' interests were compelling, Section 21.031(d) is hardly a precisely drawn definition of residency when it defines a child as a non-resident even though he has been living in McAllen, Texas since 1977 and, "has continously resided there since that time," 482 F.Supp. at 214 (emphasis added). Less restrictive and more carefully tailored definitions of school residency

are available.5/

The Court of Appeals' decision now stands as precedent in the Fifth Circuit that a State may justify the violation of fundamental constitutional rights simply by showing a "legitimate interest." This dilution of the strict scrutiny standard will greatly weaken future challenges to statutes which impinge on fundamental rights. The Court of Appeals' decision "so far departs from the accepted and usual course of judicial proceedings . . . as to call for an

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5/ See, e.g., Vlandis v. Kline, 412 U.S. 441, 454 (1973). Shivelhood v. Davis, 336 F.Supp. 1111, 1115 (D.Vt. 1971); Bright v. Beasler, 336 F.Supp. 527, 533-534 (E.D. Ky. 1971). The District Court itself implied that alternatives exist. See 482 F.Supp. at 222.

exercise of this Court's power of supervision." Sup. Ct. Rule 17.1(a).

3. The Court of Appeals Interpretation of Right to Travel Is Contrary to Supreme Court Precedent

Petitioner asserts that §21.031(d) deters American citizens, including Petitioner, from migrating to Texas by depriving them of an essential state benefit, public education. This deterrance of migration is not accidental. The Texas legislature adopted §21.031(d) for the express purpose of deterring migration by American citizens coming from Mexico to live in Texas. 482 F. Supp. at 216 (ff. 37). Such a purpose is constitutionally impermissible. Shapiro, 394 U.S. at 633. By manipulating the definition of residency for purpose of deterring migration,

Tex. Ed. Code §21.031(d) violates Petitioner's fundamental right to travel and is unconstitutional under the Supreme Court holding in Shapiro.

Both the District Court and the Court of Appeals summarily rejected Petitioner's right to travel claim stating that, only durational residency statutes can violate the right to travel. 648 F.2d at 428. This holding directly conflicts with Supreme Court precedent in Shapiro, supra; Wyman v. Bowens, 397 U.S. 49 (1970), aff'g Gaddis v. Wyman, 304 F.Supp. 717 (S.D.N.Y. 1969); and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

In Wyman, the Court struck down a motivational residency statute as a violation of the right to travel. The statute in that case defined any person

who came to New York for the primary purpose of obtaining welfare as a non-resident for the first year of his residency. Its stated objective was "to deter indigents from migrating into New York for the purpose of taking advantage of higher home relief." Wyman, 304 F.Supp. at 723. The Court held:

> [T]hat objective, regardless of the statutory form by which it is implemented (whether in terms of duration of residency, burden of proof as to motive, or the like) has been foreclosed by Shapiro.

304 F.Supp. at 723.

Although the statute in Shapiro was in fact durational, it too operated as a motivational residency requirement. It sought to deter not only new residents, but specifically "those indigents who would enter the state to obtain larger [welfare] benefits." Shapiro, 394 U.S. at 631. This motivational aspect of the

statute was held unconstitutional:

> "More fundamentally, a state may no more seek to fence out indigents who seek higher welfare benefits than it may try to fence out indigents generally."

Id. at 631.

See also, Maricopa, 415 U.S. at 264.

Shapiro and Wyman are clear: A state may distinguish between residents and non-residents in distributing essential public benefits. However, a state may not distinguish among residents based on their motive for residing in the state or the duration of their residency if it deters migration. The attempt to fence out unwanted migrants through such "distinct and independent" requirements unconstitutionally burdens travel. Shapiro, 394 U.S. at 636.

Section 21.031(d) presents the same constitutional problem as the statutes in Shapiro and Wyman. It does not seek to

distinguish transients from persons who actually reside in the school district. Rather it distinguishes between different groups of factual residents based on their motive for residing in the school district. The State grants an education to those with a worthy motive and denies an education to those who have established their residence for a purpose the State deems unworthy. The actual and intended result of this distinction is that children in the latter group are deterred from migrating to the State. 482 F.Supp. at 216. In fact, the distinctions made by §21.031(d) are even less defensible than those in Shapiro or Wyman. The State does not exclude all children who have the prohibited motive, only those in a particular living arrangement. A child living with his parents may move to a district for the purpose of attending school and

he will be admitted. But a child living with his sister who moves for the same purpose will not be admitted. See, Moore v. East Cleveland, 431 U.S. 494, 508 (1977) (Brennan, J., concurring). The penalty of exclusion from school is harsher also; it does not expire after a year as it did in Wyman, but continues indefinitely. It has applied to Petitioner for four years.

The Court of Appeals' suggestion that only durational statutes can violate the right to travel directly conflicts with Shapiro, Wyman, and Maricopa. This conflict is of paramount importance. By restricting the right to travel to a particular statutory form, the Court of Appeals has severely limited the protection which may be afforded this fundamental right. Violations of the right to travel will simply go without redress

unless they take a durational form. Courts have struck down residency statutes dealing with such diverse benefits as welfare, public housing, abortion, medical care, and voting, based on Shapiro.6/ The Court of Appeals' decision suggests that all of these statutes may be revived through the simple expedient of changing the durational requirement to a motivational one, declaring those who migrate for the purpose of obtaining a particular benefit to be ineligible not just for a year, but permanently. Wyman was summarily affirmed by this Court precisely to put an end to such attempts to disregard Shapiro.

6/ See, e.g. Besaw v. Afflect, 333 F.Supp. 775, 780 n.7 (D.R.I. 1971) and cases cited therein.

Dunn v. Blumstein, 405 U.S. 330, 336 (1972). This case once again suggests that Shapiro may be disregarded.

4. The Court of Appeals' Holding That Texas May Irrebutably Presume Non-Residence From Motive For Establishing Residence Conflicts With Supreme Court Precedent.

Whether or not §21.031(d) violates the right to travel or passes strict scrutiny, Petitioner asserts that the statute denies him due process by irrebutably presuming he is a non-resident solely because of his motive for moving to Texas. The Court of Appeals holds that this presumption from motive is constitutionally permissible because it embodies the "ultimate universal test of residency." 648 F.2d at 429. This holding directly conflicts with Supreme Court precedent, which holds that a person's motive for moving to a particular place is an irrelevant, if

not impermissible, criteria for the determination of residence or domicile.7/ See, Shapiro, 394 U.S. at 631; Wyman, 397 U.S. 49. Motive is irrelevant to the determination of domicile even for such non-vital benefits as federal diversity jurisdiction. Although a person changed domicile for the purpose of obtaining diversity jurisdiction, "the motive for change [of domicile] was immaterial; for . . . the Plaintiff had the right to select her domicile for any reason that seemed good to her." Williamson v. Osenton, 232 U.S. 619, 625 (1914); Morris v. Gilmer, 129 U.S. 315, 328 (1889). See also, Hawes v. Club Ecuestre El Comandante, 598 F.2d 698, 701 (1st Cir. 1979).

7/ The Court of Appeals equates residence under §21.031(d) with domicile, 648 F.2d at 431-432.

There is a subjective element which distinguishes a resident from a non-resident, migration from mere travel. However that subjective element is the intent to remain, to abide and make a home, not the purpose which motivates that intent. Maricopa, supra, 415 U.S. at 255. At most, a person's motive for moving is one of many factors which may be considered as evidence of a person's intent to establish a home. This Court observed in Shapiro that the desire to take advantage of welfare benefits or better educational opportunities is frequently the kind of purpose which can motivate an intent to "stay and abide." 394 U.S. at 629, 632.

Petitioner has fully met the intent to remain requirement imposed on school applicants generally. Tex. Ed. Code §21.031(c). 482 F.Supp. at 214 (ff. 7).

It should be noted, however, that little or no intent to remain is required for admission to public school. Elementary and secondary education are too vital and time too important to a child to enforce strict residency definitions which could result in children staying home rather than attending school. With the exception of §21.031(d), Texas uses an extremely liberal definition of residency for school purposes.8/ 648 F.2d at 430.

8/ It may be that the definition of residency varies with the benefit involved. See Elkins v. Moreno, 435 U.S. 647, 672 n,2 (1978) (Rehnquist, J., dissenting). If so, residence for school purposes is one of the least restrictive definitions. It would be inconceivable to enforce durational residency statutes on children moving from out of state such as are enforced against college students moving from out of state Starns v. Malkerson, 401 U.S. 985 (1971) aff'g 326 F.Supp. 234 (D.Minn. 1970).

The Court of Appeals' holding that motive is dispositive of residency merits review by this Court. Conditioning the benefits of residency upon an acceptable motive has the gravest implications for the rights of all citizens to freedom of personal choice. Cf. Roe v. Wade, 410 U.S. 113(1973). When some motives are rewarded and others penalized, the State inevitably becomes involved in questions of personal values--questions avoided when the State's only concern is intent to remain. The State ceases to be a neutral judge of who lives where, and becomes the arbiter of private motives, determining whose motives are deserving and whose are not. Outside the criminal context, no permissible state interest is served by a state passing judgment on a citizen's motive for choosing to reside in a

particular place. See, Jones v. Helms, 69 L.Ed. 2d 118, 124-126 (1981); Shapiro, 394 U.S. at 631-632; Edwards v. California, 314 U.S. 160 (1941).

Texas has chosen to finance its schools through a system which creates great disparity between wealthy and poor districts. The constitutionality of that system was upheld in San Antonio School District v. Rodriguez, 411 U.S. 1 (1973). But fundamental to that decision was the assumption that citizens of Texas are free to live where they choose, that no legal barriers exist to prevent them from moving to wealthy districts if they are dissatisfied with the quality of education in their present districts. Id. at 122 n.83 (Marshall, J., dissenting); Maricopa, supra, 415 U.S. at 271 (Douglas,

J., concurring).9/ By holding that motive for moving is the universal test of residency, the Court of Appeals suggests that a state may constitutionally require a parent or a child to show an acceptable motive before they will be allowed to establish residence in a wealthy district. In fact, one of Texas' justifications for §21.031(d) is its deterrent effect on such inter-district migration. 482 F.Supp. at 215. Of course §21.031(d) not only prevents Petitioner and those like him from pursuing a better education, it prevents them from obtaining any education

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9/ Of course, the right to move to a new district does not mean the right to commute each day from a home in one district to a school in another district. It means actually moving to a new home. Petitioner presents the case of children who have permanently left their parental home and established a home in a different place.

at all.

San Antonio School District and Shapiro make clear that a parent may move for the purpose of obtaining a better education for his child. Shapiro, 394 U.S. at 632. But, if a parent may have that express purpose for his child, why can't that same child, when his parents are legally precluded from moving with him, migrate for the purpose of obtaining a better education, indeed, in this case, the only education available to him.

For all its simplicity, the Court of Appeals' decision is a profound and dangerous one. It implies that Texas may welcome Roberto as a resident if he comes to work in its fields, but may turn its back on him if he moves to obtain an education so he may someday find a better job. Such a decision deserves plenary

consideration by this Court.

5. This Case is Closely Related to the Issues Which The Court Will Consider in Toll v. Moreno

Recently this Court granted certiorari in a college tuition case, Toll v. Moreno, No. 80-2178, 50 U.S.L.W. 3215 (Oct. 6, 1981) granting cert. to Moreno v. University of Md., 645 F.2d 217 (4th Cir. 1981). In Moreno the Court will consider, among other questions, the continued vitality of Vlandis v. Kline, 412 U.S. 441 (1973), which struck down the use of conclusive presumptions for determining residence for college tuition purposes. The decision in Toll could have a decisive impact upon this case since the Court of Appeals relied upon Vlandis and other college tuition cases to uphold §21.031(d).

There is an apparent conflict between this Court's college tuition decisions

and its right to travel decisions with respect to what a state may do to protect its interest in the finances of its colleges and public schools. See, Vlandis v. Kline, 412 U.S. 441, 455 (Marshall, J., concurring). That interest is sufficient to justify durational residency requirements for in-state tuition. Starns v. Malkerson, 401 U.S. 985 (1972) aff'g 326 F.Supp. 234 (D. Minn. 1970). Indeed, the Court in Vlandis, supra, indicated in dicta that a state may deny tuition benefits to those, "who have come [to the state] solely for educational purposes." 412 U.S. at 453-454. Yet financial interests are not sufficient to deny education to "those who move to take advantage of better educational opportunites," Shapiro, 394 U.S. at 632.

This case lies at the intersection

of Shapiro and the college tuition cases. As a school tuition case it is plainly related to the college cases. But like welfare in Shapiro, primary education is a life necessity. Beneficial as reduced college tuition may be it cannot be compared to the absolute deprivation of all primary education, Starns, 326 F.Supp. at 238. And like the statute in Shapiro, §21.031(d) is specifically designed to discriminate against a particular group of people in order to deter them from migrating. No such purpose may be ascribed to college residency rules, Starns, 326 F.Supp. at 237, at least until Toll.

The issues raised in striking a constitutional balance between the interests of states in the finances of their colleges and public schools and the competing interests of individuals in obtaining those

benefits are already before the Court in Toll v. Moreno, supra, and Alien School Children, supra. Toll presents these issues in the context of individuals denied reduced college tuition; Alien School Children presents them in the context of illegal aliens denied public schooling. Certiorari should be granted to review this case because it raises these same issues and does so in their most pressing context: the absolute deprivation of elementary and secondary education to United States citizens.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review and reverse the judgment and opinion filed by the Fifth Circuit in this case.

Respectfully submitted,

JAMES A. HERRMANN
TEXAS RURAL LEGAL AID, INC.
305 E. Jackson, Suite 206
Harlingen, Texas 78550
(512) 423-3111

Attorney of Record for
Petitioner

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
P.O. Box 2223
Hereford, Texas 79045
(806) 364-3961

Of Counsel for Petitioner

Appendix

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MARIA ARREDONDO, et al,
Plaintiffs-Appellants,

v.

M. L. BROCKETTE, et al.,
Defendants-Appelees.

No. 80-1031

June 19, 1981

Appeal from the United State District Court for the Southern District of Texas.

Before BROWN, GEWIN*, and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

The sole issue in this case is the constitutionality vel non of Tex. Educ.

*Due to his death on May 15, 1981, Judge Gewin did not participate in this decision. The case is being decided by a quorum, 28 U.S.C. §46(d).

Code Ann. tit. 2, §21.031(d) (Vernon Supp. 1978), which provides:

> In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools. (Emphasis added).

Appellants are United States citizens between five and eighteen years of age, not living with their parents or legal guardians, who have chosen to live in a school district for the primary purpose of attending its free public schools. They were denied tuition-free admission to the public schools because of the strictures of the challenged statute.

The district court, 482 F.Supp. 212, upheld the statute. We affirm.

The original complaint was filed as a class action, but this aspect was eliminated by an amended complaint. Only two of the original plaintiffs remain, Roberto Morales and Rita Gomez 1/. It is contended that §21.031(d) of the Texas Education Code violates the due process and equal protection clauses of the fourteenth amendment of the Constitution.

1/ The other plaintiffs are no longer parties to the litigation for various reasons, they withdrew from the school district, were subsequently admitted into the public schools, or presented no evidence in support of their claim.

Appellants argue that the challenged statute, as applied, results in invidious discrimination against Mexican-Americans, violating their right to equal protection. The Supreme Court has found classifications based on race or alienage inherently suspect and subject to close judicial scrutiny. Graham v. Richardson, 403 U.S. 365, [648 F.2d 428] 371-72, 29 L.Ed.2d 534 (1971). Were this statute to be so classified, it would be subjected to strict judicial scrutiny and would not be upheld unless a compelling state interest were shown. San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). We do not address this question because discriminatory application is not alleged in the

amended complaint. The issue may not be revived on appeal.

Appellants assert a second ground for application of the compelling interest test - the statute improperly burdens the fundamental right of interstate travel. Strict judicial scrutiny is also appropriate in those situations in which a constitutionally protected right is infringed. San Antonio School District v. Rodriguez, supra, 411 U.S. at 40, 93 S.Ct. at 1300. Although not explicitly mentioned in the Constitution, the right to interstate travel has been repeatedly recognized as a basic right, fundamental to the concept of our federal union. United States v. Guest, 383 U.S. 745, 757-58, 86 S.Ct. 1170, 1177-1178, 16 L.Ed.2d 239 (1966). We recognize that the statutory definition

of residency in §21.031(d) denies tuition-free admission to public school to those whose presence in the school district is primarily for that purpose. All residency requirements, however, are not unconstitutional. The Supreme Court has distinguished between residency requirements and durational residency requirements, finding only the latter violative of the right to travel. See McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed.2d 366 (1976). Based on this distinction, the district court declined to apply the strict scrutiny standard, requiring instead that the statute be supported by minimum rationality and, on that basis, found the statute constitutional.

We agree in principle with the district court's analysis of the right

to interstate travel. Nevertheless, we defer the determination whether the strict scrutiny or rational basis yardstick should be applied for under either measure Texas' interests in enacting the statute are sufficient. We need not decide whether in another instance involving a similar statute a legitimate state interest alone would suffice. We are in accord with the district court's articulation of the state's interests, expressed as follows:

"A state has a legitimate interest in protecting and preserving the quality of its educational system and the right of its own bona fide residents to attend state schools on a preferred tuition basis. Vlandis v. Kline, [412 U.S. 441, 452-53, 93 S.Ct. 2230, 2236-2237, 37 L.Ed.2d 63 (1973)].

Similarly, the state would have an interest in preserving the financial integrity of the various components of the state educational system, i.e., the individual school districts. East Texas Guidance and Achievement Center, Inc. v. Brockette, 431 F.Supp. 231, 236 (E.D. Tex. 1977). . .[T]he statute on its face [applies] to children of parents living anywhere in Texas or in any of the United States. Since the statute applies to any minor student living apart from his parents, guardian or other person with lawful control, it even applies to attempted transfers between different school districts within the same county. The Court is satisfied with these kinds of transfers, free of all tuition, would cause budgetary and administrative planning problems sufficient to justify the tuition scheme of the statute. As

stated in DeLeon v. Harlingen Consolidated Independent School District, [552 S.W.2d 922 (Tex. Civ. App. - Corpus Christi 1977, no writ)]:

> 'The variability of student population is a serious impediment to the effective planning of virtually all phases of the educational process. There is no justification for a requirement that a school system educate in tuition-free manner those children whose only indicia of residence is mere presence within the district, accompanied by the student's desire (or that of his parents) to attend school therein. It is reasonable to draw the line of residency, at least for school admission purposes, between those who come within a school district because they had to move into the district for some valid reason other than [648 F.2d 429] for educational purposes, and those who have come there for the sole purpose of getting tuition-free education within the district. There is no reason to add to the burdens of a school district by freely admitting to its schools anyone who has previously resided outside the district simply because they wanted to attend the schools in the district.' 552 S.W.2d at 925." [Footnotes omitted.]

Appellants argue that regardless of the level of judicial scrutiny, the statute at issue creates an irrebuttable presumption of non-residency and, therefore, violates the due process clause of the fourth amendment. Section 21.031(d) allows a person under 18 to establish a residence separate from his parents or legal guardian, for the purpose of attending school in the district in which his separate residence is located, but only if the minor's residence is not established in that school district for the primary purpose of attending its free public school. Appellants insist that through its definition of residency the statute establishes an irrebuttable presumption that a person living in a school district for the primary purpose of attending its school is a non-resident. We are

impressed by the well-reasoned and thorough analysis and discussion of the district judge and adopt his response to this contention as our own:

"This contention is essentially grounded on two key cases, Carrington v. Rash, 380 U.S. 89 [85 S.Ct. 775, 13 L.Ed.2d 675] (1965) and Vlandis v. Kline, 412 U.S. 441, [93 S.Ct. 2230, 37 L.Ed.2d 63] (1973). In Carrington, the Court was concerned with the provision of the Texas Constitution that prohibited any member of the armed forces of the United States who moved his home to Texas during the course of his military duty from ever voting in a Texas election so long as he or she is a member of the Armed Forces. The Court held that this provision violated the equal protection clause of the Fourteenth Amendment. In

that case, however, it was undisputed that the petitioner had been domiciled in Texas and that he 'intend[ed] to make his home there permanently.' 380 U.S. at 91 [85 S.Ct. at 777]. The Court stressed that Texas had the right to require all military persons to be bona fide residents of the community before they were entitled to vote but concluded that if the military personnel were 'in fact residents, with the intention of making Texas their home indefinitely', then they had the right to be treated the same as other Texas residents. Id. at 93-94 [85 S.Ct. at 778-779].

"In Vlandis, the Court considered a Connecticut statute which attempted to define residents and non-residents for purpose of paying higher tuition at state universities. Under the statutory

scheme, once a student was classified as a 'non-resident', his status was permanent and irrebuttable during the entire time that he remained at the university, regardless of the particular fact situation of any given student. The Court held that this statute was a violation of the constitutional right to due process. In so doing, however, the Court was careful to observe that it was not questioning the segregation of students into resident and non-resident categories nor the charging of higher fees to the latter group. The narrow holding in Vlandis, therefore, was simply that a permanent irrebuttable presumption of non-residence violated the due process clause.

"The Court cannot agree that the statute involved here creates an

irrebuttable presumption of the type condemned by Vlandis. The challenged portion of the statute provides, in essence, that if a student under the age of eighteen years is living apart from his parent, guardian, or other person having lawful control of him under court order, then in order to establish residency for purposes of attending free public schools, that student must establish that his presence in the school district is 'not for the primary purpose of attending the public free schools'. Thus, unlike statutes which set forth objective criteria for residency such as length of time or a negative category (such as 'member of the Armed Forces'), this statute codifies the ultimate universal test of residency, namely [648 F.2d 430] subjective intent. Of

course, there is a certain superficial logic to the argument that the statutory definition is 'irrebuttable' because as long as the minor student admits that he is living apart from his parent or guardian for the sole purpose of attending free public schools in a particular district, then he can never be classified as a resident. On the other hand, however, by using the definition of residency almost universally accepted in school cases, the statutory criteria in one sense merely states a truism, namely that a person who only intends to remain in a given place temporarily in order to take advantage of a particular benefit at that location necessarily lacks the permanence to be classified as a resident.

"Thus, in Vlandis, supra, the

Supreme Court said:

> 'The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.' 412 U.S. at 453-4 [93 S.Ct. at 2237] (emphasis supplied).

In Spriggs v. Altheimer, Arkansas School District Number Twenty-Two, 385 F.2d 254 (8th Cir. 1967), the minor school children had been charged tuition because they were living with their grandfather rather than with their mother who lived in another school district. The Eighth Circuit remanded the case to the district court to make a factual determination as to the residency of the children for purposes of the Arkansas statute which

provided free public schools to all persons 'residing' in the district. The trial court was instructed to hear further evidence on the question but the following guideline was given:

> 'On the other hand, if the residency of the children with their grandfather is only temporary for the primary purpose of attending school in a district other than where their parents reside, then tuition under the statutes would be proper.' 385 F.2d at 259.

In Clarke v. Redeker, 259 F.Supp. 117 (S.D. Iowa 1966) (three judge court), regulations classifying residents and non-residents for tuition purposes at the State University of Iowa were upheld as being constitutionally valid on their face. Among other things, these regulations defined a bona fide resident to mean a student who is 'not in the state primarily to attend a

college'. 259 F.Supp. at 121. In Kelm v. Carlson, 473 F.2d 1267 (6th Cir. 1973), the Court noted that where a statute and regulation 'seek to distinguish between temporary sojourners in Ohio who reside there only for school purposes and Ohio residents, the intention of the party and what he has done to evidence that intent becomes critical.' Id., at 1271. Presence in a school district for the primary purpose of attending school was also held insufficient 'residency' for tuition purposes in Mansfield Township Board of Education v. State Board of Education [101 N.J.L. 474], 129 A. 765 (N.J. Sup. Ct. 1925) and Mt. Hope School Dist. v. Hendrickson [197 Iowa 191], 197 N.W. 47 (Iowa Sup.Ct. 1924).

"In the instant case, Plaintiffs

attack the statute only on its face but it is interesting to note that at least as applied within the Defendant school districts, the statute can hardly be called irrebuttable in actual practice. Indeed, the stipulated evidence clearly shows that between approximately August 1, 1977, and May 25, 1978, the McAllen Independent School District had only 56 applications from students who were United States citizens and covered by §21.031(d) and, of that number, all but five were enrolled in school. See Finding of Fact No. 38. The evidence indicated that students living apart from their parent or guardian because of physical health or emotional well-being, broken homes, health reasons, etc., are all allowed to qualify for free public schools.

Thus, if the statute in question contains even an indirect presumption of non-residency, certainly the presumption is rebuttable in practice. See Michelson v. Cox, 476 F.Supp. 1315 (S.D. Iowa 1979). Even if a child were to originally move into the school district for the primary purpose of attending school, there is nothing on the [648 F.2d 431] face of the statute nor apparently in actual practice, to prohibit the child from being reclassified as a resident if in fact his circumstances - specifically his primary motive for being in the district would change from one school semester to another. In summary, therefore, the only students to whom the statutory definition of non-residency is in any sense irrebuttable are those students who persist in declaring that their primary purpose for being present in the school district is to attend the

public free schools. Because such a declaration would ipso facto place the student within the classic legal definition of a non-resident, the Court concludes that it does no violence to the Constitution.

"Plaintiffs further suggest, however, that the statute is discriminatory because only one category of students must defend its motives. In other words, a literal reading of Section 21.031(d), reflects that if a student under the age of eighteen years is living with his parents, legal guardian, or some person having lawful control of him under court order, then that student's purpose for being in the school district is unquestioned. It is only when a person under the age of eighteen

years is living apart from a parent or guardian or other person having lawful control that he must establish the proper motive for being in the district. In resolving this contention, it is again necessary to recall the Court's earlier conclusion that this statute must only pass the rational basis test.

"As stated in Dandridge v. Williams, 397 U.S. 471 [90 S.Ct 1153, 25 L.Ed.2d 491] (1970):

> 'In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis", it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 [31 S.Ct. 337, 340, 55 L.Ed. 369]. "The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may

> be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 [33 S.Ct. 441, 443, 57 L.Ed. 730]. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 [81 S.Ct. 1101, 1105, 6 L.Ed.2d 393].' 397 U.S. at 485 [90 S.Ct. at 1161].

The Court concludes that in the present statutory scheme, there is some reasonable basis for separately classifying minor school children living apart from their parents, guardian or other person having custody under court order. Section 21.031(d) attempts to define 'residence' for this one class of students. The word 'residence' has many meanings in the law, largely determined by the statutory context in which it is used. Kelm v. Carlson, 473 F.2d 1267, 1271 (6th Cir. 1973). Within the context of

§21.031(d), residence means something more than mere physical presence and thus is more closely related to the concept of domicile. See DeLeon v. Harlingen Consolidated Independent School District, 552 S.W.2d 922, 924 (Tex.Civ.App. - Corpus Christi 1977, no writ). The cases discussing the domicile of a minor are, therefore, extremely helpful in evaluating the reasonableness of this legislative classification. Under Texas common law, a minor is 'not sui juris, and can neither select nor change its domicile, which is fixed by law as that of its father.' Smith v. Ansley, 257 S.W.2d 156, 157 (Tex.Civ.App. - Waco 1953, writ ref'd n.r.e.); see Bradshaw v. Peacock [145 Tex. 68], 194 S.W.2d 551, 554 (Tex.Sup.Ct.1946); Mills v Howard,

228 S.W.2d 906, 907 (Tex.Civ.App. - Amarillo 1950, no writ); see generally, Restatement of Conflicts of Law §11 (1934). This notion rests in large measure upon the minor's presumed lack of capacity to form the requisite intention necessary to establish a separate domicile. Deterly v. Wells, 53 S.W.2d 847, 848 (Tex.Civ.App. - Dallas 1932, writ ref'd). Indeed, the common law presumption is so strong that even when a child is abandoned by both [648 F.2d 432] parents, he still cannot acquire his own domicile. See generally Restatement of Conflict of Law §34 (1934) (where a child is abandoned by both parents it takes its father's domicile at the time of the abandonment). Since the child's ability in Texas to acquire his own separate residence is a matter of legislative grace, it is certainly not unreasonable

to require that his presence in another school district be for some cogent reason other than attending free public school in that district before qualifying for tuition-free status. See DeLeon v. Harlingen Consolidated Independent School District, supra, at 924."

[Footnotes omitted.]

We hold that §21.031(d) is a constitutional enactment of the Texas state legislature. The decision of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CA-B-77-296

MARIA ARREDONDO as next friend for ANDRES LOPEZ, JESUS CARRILLO as next friend for FIDEL ALVARES, MRS. ARTINO GARZA as next friend for DOLORES MICHELLE RODRIGUEZ, ORALIA MARTINEZ as next friend for DELIA and ROBERTO MORALES, FLORA FALCON as next friend for RITA GOMEZ, ANTONIO GUTIERREZ as next friend for SILVESTRE MARQUEZ LOPEZ, and VICTORIA MARTINEZ as next friend for MARTA GUTIERREZ-GONZALEZ,

Plaintiffs

VS.

M.L. BROCKETTE, Commissioner of

Education in his official capacity, the TEXAS EDUCATION AGENCY, PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT, McALLEN INDEPENDENT SCHOOL DISTRICT, MISSION INDEPENDENT SCHOOL DISTRICT, HARLINGEN INDENPENDENT SCHOOL DISTRICT, and ARTURO GUERRA, RODNEY CATHY, KENNETH WHITE, and DAN IVES, individually and in their offic _l capacities,

Defendants

[482 F.Supp. 213]

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

As will be more fully detailed below, the instant suit was originally filed asking the Court to declare unconstitutional a state statute and to enjoin the attempted enforcement of same. A hearing was held on

October 26, 1979, at which time evidence on the merits was received. Pursuant to Rule 52, Federal Rules of Civil Procedure, the Court now submits its Findings of Fact and Conclusions of Law. Virtually all of the findings of fact are based upon stipulations made between the parties.

FINDINGS OF FACT

1. Both Plaintiff Roberto Morales and Plaintiff Rita Gomez are United States citizens.

2. Each child is over five years of age and under eighteen years of age.

3. Plaintiff Roberto Morales lives within the McAllen Independent School District for the primary purpose of attending school and learn-

ing English.

4. Plaintiff Rita Gomez lives within the Pharr-San Juan-Alamo School District for the primary purpose of attending school.

5. Neither Plaintiff resides with his or her parent, legal guardian, or other person [482 F.Supp. 214] having lawful control of him under a court order.

6. Neither Plaintiff has a parent, legal guardian, or other person having lawful control of him residing in the McAllen or Pharr-San Juan-Alamo School Districts.

7. Both Plaintiffs would otherwise be eligible for admission to the public free schools under the provisions of Tex. Educ.

Code Ann. tit. 2, §21.031 (c)

(Vernon Supp. 1978), which provides:

> The board of trustees of any public free shcool district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

8. Both Plaintiffs were denied admission to the Texas free schools under the provisions of Tex. Educ. Code Ann. tit. 2, §21.031(d) (Vernon Supp. 1978), which provides:

> In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining

whether an applicant for admission is a resident of the school district for purposes of attending the public schools.

9. Plaintiff Roberto Morales began living in McAllen Independent School District at the beginning of the 1977 school year and has continuously resided there since that time.

10. Plaintiff Roberto Morales only intends to reside in the McAllen Independent School District until he completes his education.

11. While Plaintiff Roberto Morales was denied admission to the McAllen Independent School District in 1977 and 1978, he was granted permission to attend school in November, 1978, contingent upon the payment of tuition. (See Pl. Exh. No. 2).

12. Plaintiff Roberto Morales and the person with whom he is residing are both indigent.

13. In November, 1978, tuition in the amount of $378.00 was paid on behalf of Plaintiff Roberto Morales by the Texas Rural Legal Aid, Inc. The parties apparently dispute whether these funds were those of the corporation itself or whether they were actually furnished by the family of Morales. Insufficient evidence was presented to enable the Court to resolve this point but the Court regards the issue as irrelevant to the ultimate disposition of the case. (Pl. Exh. No.3).

14. Plaintiff Roberto Morales has not paid tuition for the Spring, 1978, or Fall, 1979, semesters and he was originally informed that his continued enrollment was conditioned upon the payment of all monies due and the availability of space.

15. Plaintiff Roberto Morales was expelled from school on November 28, 1978, for failure to pay tuition. On December 12, 1979, this Court issued a preliminary injunction returning him to school conditioned upon his first posting a bond in the sum of $1,224.00 to secure Defendant McAllen School District's claims for tuition against Plaintiff. The Plaintiff is now in school pending ultimate determination of this case on the merits.

16. Plaintiff Rita Gomez only intends to reside in the Pharr-San Juan-Alamo School District until she completes her education.

17. Plaintiff Rita Gomez was denied admission to school for the 1979-80 school year by officials of the Pharr-San Juan-Alamo School District.

18. Plaintiff Rita Gomez and the

person with whom she is residing are both indigent.

19. Plaintiff Delia Morales, a United States citizen and the sister of Plaintiff [482 F. Supp. 215] Roberto Morales, was also denied admission to the McAllen Independent School District, pursuant to §21.031 (d). She was then admitted upon paying tuition, but subsequently withdrew from school and returned to Mexico. Her tuition was refunded by the McAllen School District. See Pl. Exh. 5.

20. According to admissions contained in the pleadings, Plaintiff Fidel Alvares, a United States citizen, was also denied admission to the McAllen Independent School District, pursuant to §21.021(d), but no further evidence was presented either in support of or in opposition to his claim.

21. According to the pleadings, Plaintiff Andres Lopez, a United States citizen, was originally denied admission to the Pharr Independent School District, pursuant to §21.031(d), but was subsequently admitted. No further evidence was presented either in support of or in opposition to his claim.

22. Prior to trial, the Plaintiffs voluntarily dismissed their cause of action as to Defendants Harlingen Independent School District and Dan Ives. The dispute of Plaintiffs Silvestre Marquez Lopez and Marta Gutierrez-Gonzales was with these Defendants; therefore, their claims will not be adjudicated herein.

23. Prior to trial, Plaintiffs moved and were granted permission to dismiss, without prejudice, their cause of action against Defendants Mission Independent School District and Kenneth

White. Since, according to the motion, no known Plaintiffs are currently being excluded from the district, the claim of Plaintiff Dolores Michelle Rodriguez has been rendered moot and incapable of adjudication.

24. None of the adults with whom the Plaintiffs reside desire to become the legal guardian or legal custodian of the child who lives with them.

25. The Texas statute in question operates to absolutely deprive a child of an education if it is determined that the child resides apart from his or her parent, legal guardian or one having lawful control over him or her for the primary purpose of attending the free school and that child is indigent.

26. If Section 21.031(d) of the Texas Education Code were declared unconstitutional, it would, in all probab-

ility, cause the immediate enrollment of thousands of children from other states and countries who are United States citizens whose parents do not reside within the relevant school district. Furthermore, the enrollment would probably increase significantly each year.

27. The legislative classification imposing the residency requirement applies to intrastate school district transfers as well as transfers of children from other states and countries.

28. Declaring the statute unconstitutional would cause substantial numbers of intra-district transfers, which would further cause school populations to fluctuate. Also, the intra-state migration of students between school districts would cause problems in the althletic programs by possibly encouraging the recruitment of athletes.

29. Fluctuating school populations would make it impossible to predict enrollment figures--even on a semester-by-semester basis, causing over-or-under-estimates on teachers, supplies, materials, etc.

30. The increased enrollment of students would cause overcrowded classrooms and related facilities; over-large teacher-pupil ratios; expansion of bilingual programs; the purchase of books, equipment, supplies and other customary items of support; all of which would require a substantial increase in the budget of the school districts.

31. Neither the State of Texas nor the Texas Education Agency nor the United States of America provides funds to assist school districts with educating Plaintiffs or children similarly situated. This burden falls exclusively upon the local

school district.

32. Some school districts are presently taxing at the maximum rate allowed by law and have no means to obtain more financial assistance.

33. Most of the children in the Plaintiffs' category do not pay any local school or state taxes or tuition and, therefore, their [482 F.Supp. 216] education would be funded and paid for by the resident taxpayers of the State of Texas and the school district, including some of the adults the children live with in the school district.

34. The intrastate and interstate transfers would, in all probability, have a detrimental effect on the educational standards of the Defendant school districts and the c...er school districts in the State of Texas.

35. The children in this case live

with persons who could, in the absence of notice to the contrary, consent to medical treatment for the minor. See Tex. Fam. Code Ann. §35.01(2)(Vernon 1975).

36. The statutory definition contained in Section 21.031(d) was passed to give administrators a statutory guideline to follow in determining a genuine bona fide resident.

37. At least one of the legislative purposes behind Section 21.031(d) was to inhibit the migration of persons residing in Mexico to attend schools in the United States. See Pl. Exh. 6.

38. Between August 1, 1977, and May 25, 1978, out of a total of fifty-six minor United States citizens living apart from their parents, legal guardian or other person having lawful control over them, who applied for admission to the McAllen Independent School District,

fifty-one of these children were admitted.

39. In denying an earlier Motion for a Preliminary Injunction, then-presiding Judge Reynaldo Garza found that the Defendant school districts had been most liberal in finding that certain children, like the Plaintiffs, are not living away from their parents or residing in the school districts for the sole purpose of attending school. Judge Garza further found that analysis of the records submitted in this case conclusively showed that children living within the school districts with someone other than their parents or legal guardians will be admitted to school if any reason exists for such situation other than solely attending school. This Court has no reason to doubt the accuracy of these findings and they are adopted

for purposes of this Opinion.

40. The parties have specifically limited this case to the issue of the facial constitutionality of Tex. Educ. Code Ann. §21.031(d).

41. On October 26, 1979, it was agreed in open court that the Plaintiffs' Motion for a Preliminary Injunction would be consolidated into a final hearing on the merits. See generally Fed. R. Civ. P. 65(a)(2).

42. In the event that any of the foregoing findings of fact also constitute conclusions of law, they are adopted as such. In the event that any of the following conclusions of law also constitute findings of fact, they are adopted as such.

CONCLUSIONS OF LAW

This case presents the very narrow issue of whether Tex. Educ. Code Ann.

§21.031(d) is unconstitutional on its face. Earlier in the case, Plaintiffs specifically requested and were granted permission to amend their complaint to eliminate any contention that the statute was unconstitutional as applied to them. The minor Plaintiffs are United States citizens residing within Texas and living apart from their parents, legal guardian or other person having lawful control over them. These children desire to attend public schools on a tuition-free basis. The Defendant school districts have refused to admit the children tuition-free, having determined that the Plaintiffs are living apart from their parents, legal guardian or other person having lawful control over them by court order for the primary purpose of attending the free public schools. See Tex. Educ. Code Ann. §21.031(d) (Vernon Supp. 1978).

This Court first notes that as a

general rule the Constitution "does not invalidate state legislation because it fails to embody the highest wisdom or provide the best conceivable remedies." Cohen v. Beneficial Industrial Loan Co., 337 U.S. 541, 550-51 (1949). This Court's task is thus not to weigh a statute's effectiveness but its constitutionality. James v. Strange, 407 U.S. 128, 133 (1972) (rational basis test applied). Furthermore, the fact that an inequitable [482 F.Supp. 217] result may be forthcoming does not render a statute unconstitutional. See Wickard v. Filburn, 317 U.S. 111, 129-30 (1942).

As Plaintiffs candidly recognize, any statute is the result of a legislative choice that inevitably affects one group differently from others and, therefore, gives rise to claims of unequal treatment. Whether such statute is unconstitutional under the equal protection clause is

generally determined by the "rational basis test"; that is, the statute is entitled to a presumption of validity and will be upheld so long as it bears some rational relationship to the achievement of a legitimate purpose. San Antonio School District v. Rodriguez, 411 U.S. 1, 40 (1973). On the other hand, if a statute involves "suspect classifications" or if it interferes with a fundamental right explicitly or implicitly protected by the Constitution, then the statute must withstand "strict judicial scrutiny". It is not entitled to the usual presumption of validity, and the statute must fail unless it is necessary to promote a compelling state interest. Id., at 16-17. Plaintiffs rightfully do not contend that the statute in question involves any suspect classifications, as it applies on its face to all students of whatever

race, sex, or national origin.1/ Further, this statute involves secondary education and the Plaintiffs recognize that while education is unquestionably vital, the Supreme Court has held that it is not among the rights afforded explicit or implicit protection under the Constitution. Id., at 35. In an effort to bring this statute within the much stricter "compel-

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1/ The United States Supreme Court has identified numerous suspect classifications. For example, racial classifications and classifications based on alienage are deemed suspect and subject to "strict scrutiny". See Graham v. Richardson, 403 U.S. 365 (1971)(alienage); Loving v. Virginia, 388 U.S. 1 (1967)(race); McLaughlin v. Florida, 379 U.S. 184 (1964)(race). Although sexual classifications were held to be suspect in one case, Frontiero v. Richardson, 411 U.S. 677 (1973), recent cases evidence a retrenchment from this position and the application by the Supreme Court of an intermediate scrutiny. See Orr v. Orr, 440 U.S. 268, 278-79 (1979).

ling interest" test, Plaintiffs allege that the statute improperly burdens their fundamental constitutional right to travel, and they thereby seek relief under the umbrella of such decisions as Shapiro v. Thompson, 394 U.S. 618 (1969) and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

Shapiro, supra, affirmed lower court decisions declaring unconstitutional those statutes denying welfare assistance to residents of a state who had not resided within their jurisdiction for at least one year immediately preceding the application for assistance. The Court found that the statutes penalized the exercising of a constitutional right to interstate travel and therefore failed because they were not necessary to promote a compelling state interest. Memorial Hospital, supra, announced a similar

result with respect to a statute requiring a one-year's residence as a condition to receiving non-emergency hospital or medical care at county expense. There is a fundamental and critical difference, however, between the statutes involved in those cases and the statute before this Court. The Supremc Court has made it crystal clear that the defect in the Shapiro and Memorial Hospital statutes was not that they had residency requirements but that they had durational residency requirements.

In Shapiro, supra, the Court clearly noted that residency and one-year residency were two separate and distinct prerequisites for welfare assistance. 394 U.S. at 636. Later, in Dunn v. Blumstein, 405 U.S. 330 (1972), a case concerning a durational residency requirements for voting, the Court again applied the compelling interest

rule. However, the Court made it clear that the challenge was not directed at the requirement of residency but rather at the requirement of durational [482 F. Supp. 218] residency. "We emphasize again the diference between bona fide residence requirements and durational residence requirements." 405 U.S. at 343. This distinction was more clearly defined in Memorial Hospital, supra, where the Court reemphasized that the constitutional right to interstate travel did not mean merely the right to be in motion but rather the right to migrate, resettle, and start a new life. 415 U.S. at 255. The Court concluded that while every bona fide residence requirement would necessarily burden a simple right to move from one location to another, it was only a durational residency requirement that impermissibly burdened the constitutional right "to migrate, 'with

intent to settle and abide!" Id. More recently, in McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976), the Court repeated that: "We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration." 424 U.S. at 647.

The Fifth Circuit Court of Appeals has also recognized this distinction in upholding an ordinance requiring all municipal employees to maintain their domicile and principal place of residence within the corporate limits of the city during the period of their employment. Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975). Noting that there is no fundamental constitutional "right to commute", the Fifth Circuit held that a bona fide continual residency requirement is not to be tested by the strict compelling

purpose standard but rather by the traditional rational basis test. Similarly, in Andre v. Board of Trustees of Village of Maywood, 561 F.2d 48 (7th Cir. 1977), cert. denied, 434 U.S. 1013 (1978), the court noted:

> "All residency restrictions have an effect on the right to interstate travel, but only those residency restrictions which can be characterized as 'durational' have been found to unconstitutionally impinge or penalize the right to travel, in the absence of some compelling state interest. Durational residency requirements classify residents into groups of residents who have fulfilled the residency requirements and those who have not...Bona fide residency requirements as continuing conditions of municipal employment rest upon footings significantly different from those of durational residency requirements." 561 F.2d at 52.

In the instant case, the Texas statute only attempts to articulate a residency definition and in no way contains a durational residency requirement. The Court, therefore, concludes that the statute

does not burden the constitutional right to travel and thus must be examined under the rational basis test.[2/]

2/ Even if a durational residency requirement were involved in this case, it would not automatically be considered an unconstitutional penalty on the right to interstate travel. In Shapiro, supra, the Court expressly reserved decision as to whether a durational residency requirement for "tuition free education" would be unconstitutional. 394 U.S. at 638 fn. 21. In Memorial Hospital, supra, the Court reiterated that, depending upon what right is affected, some waiting periods may not be penalties. 415 U.S. at 258-59. In Vlandis v. Kline, 412 U.S. 441, 452-53 (1973), the Court specifically declined to hold that a state could not impose a "reasonable durational residency requirement" as one element in demonstrating bona fide residence for purposes of lower tuition and fees. In Starns v. Malkerson, 326 F.Supp. 234 (D.Minn. 1970), aff'd, 401 U.S. 985 (1971), the district court upheld a university regulation providing that no student could qualify as a resident for tuition purposes unless he had been a bona fide domiciliary of the State for at least one year, and this decision was affirmed by the Supreme Court. In Sosna v. Iowa, 419 U.S. 339 (1975), the Court upheld a one year durational residency requirement for obtaining a divorce.

Before analyzing whether or not the statute can pass this test, however, the Court will next consider Plaintiffs' second basic point of attack.

Plaintiffs contend that the statute violates both the due process and equal [482 F.Supp. 219] protection clauses of the Fourteenth Amendment because its definition of residency creates "an invalid irrebuttable presumption of non-residency".3/ This contention is essentially grounded on two key cases, Carrington v. Rash, 380 U.S. 89 (1965) and Vlandis v. Klein, 412 U.S. 441 (1973). In Carrington, the Court was concerned with the provision of the Texas Constitution that prohibited any member of the armed forces of the United States who moved his home

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3/ Plaintiffs' First Amended Complaint Para. 21b.

to Texas during the course of his military duty from ever voting in a Texas election "so long as he or she is a member of the Armed Forces". The Court held that this provision violated the equal protection clause of the Fourteenth Amendment. In that case, however, it was undisputed that the petitioner had been domiciled in Texas and that "he intend[ed] to make his home there permanently". 380 U.S. at 91. The Court stressed that Texas had the right to require all military persons to be bona fide residents of the community before they were entitled to vote but concluded that if the military personnel were "in fact residents, with the intention of making Texas their home indefinitely", then they had the right to be treated the same as other Texas residents. Id. at 93-94.

In Vlandis, the Court considered a

Connecticut statute which attempted to define residents and non-residents for purpose of paying higher tuition at state universities. Under the statutory scheme, once a student was classified as a "non-resident", his status was permanent and irrebuttable during the entire time that he remained at the university, regardless of the particular fact situation of any given student. The Court held that this statute was a violation of the constitutional right to due process. In so doing, however, the Court was careful to observe that it was not questioning the segregation of students into resident and non-resident categories nor the charging of higher fees to the latter group. The narrow holding in Vlandis, therefore, was simply that a permanent irrebuttable presumption of non-residence violated the due process clause.

The Court cannot agree that the statute involved here creates an irrebuttable presumption of the type condemned by Vlandis. The challenged portion of the statute provides, in essence, that if a student under the age of eighteen years is living apart from his parent, guardian, or other person having lawful control of him under court order, then in order to establish residency for purposes of attending free public schools, that student must establish that his presence in the school district is "not for the primary purpose of attending the public free schools". Thus, unlike statutes which set forth objective criteria for residency such as length of time or a negative category (such as "member of the Armed Forces"), this statute codifies the ultimate universal test of residency, namely subjective intent. Of course, there is a certain

superficial logic to the argument that the statutory definition is "irrebuttable" because as long as the minor student admits that he is living apart from his parent or guardian for the sole purpose of attending free public schools in a particular district, then he can never be classified as a resident. On the other hand, however, by using the definition of residency almost universally accepted in school cases, the statutory criteria in one sense merely states a truism, namely that a person who only intends to remain in a given place temporarily in order to take advantage of a particular benefit at that location necessarily lacks the permanence to be classified as a resident.

Thus, in Vlandis, supra, the Supreme Court said:

> "The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact,

> bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates." 412 U.S. at 453-4 (emphasis supplied).
>
> [482 F.Supp. 220]

In Spriggs v. Altheimer, Arkansas School District Number Twenty-Two, 385 F.2d 254 (8th Cir. 1967), the minor school children had been charged tuition because they were living with their grandfather rather than with their mother who lived in another school district. The Eighth Circuit remanded the case to the district court to make a factual determination as to the residency of the children for purposes of the Arkansas statute which provided free public schools to all persons "residing" in the district. The trial court was instructed to hear further evidence on the question but the following guideline was given:

> "On the other hand, if the

> residency of the children with their grandfather is only temporary for the primary purpose of attending school in a district other than where their parents reside, then tuition under the statutes would be proper." 385 F.2d at 259.

In Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966) (three judge court), regulations classifying residents and non-residents for tuition purposes at the State University of Iowa were upheld as being constitutionally valid on their face. Among other things, these regulations defined a bona fide resident to mean a student who is "not in the state primarily to attend a college". 259 F. Supp. at 121. In Kelm v. Carson, 473 F.2d 1267 (6th Cir. 1973), the Court noted that where a statute and regulation "seek to distinguish between temporary sojourners in Ohio who reside there only for school purposes and Ohio residents, the intention of the party and what he has done to evid-

ence that intent becomes critical." Id. at 1271. Presence in a school district for the primary purpose of attending school was also held insufficient "residency" for tuition purposes in Mansfield Township Board of Education v. State Board of Education, 129 A. 765 (N.J. Sup. Ct. 1925) and Mt. Hope School Dist. v. Hendrickson, 197 N.W.47 (Iowa Sup. Ct. 1924).

In the instant case, Plaintiffs attack the statute only on its face but it is interesting to note that at least as applied within the Defendant school districts, the statute can hardly be called irrebuttable in actual practice. Indeed, the stipulated evidence clearly shows that between approximately August 1, 1977, and May 25, 1978, the McAllen Independent School District had only 56 applications from students who were United States citizens and covered by §21.031(d) and, of

that number, all but five were enrolled in school. See Finding of Fact No. 38. The evidence indicated that students living apart from their parent or guardian because of physical health or emotional well-being, broken homes, health reasons, etc., are all allowed to qualify for free public schools. Thus, if the statute in question contains even an indirect presumption of non-residency, certainly the presumption is rebuttable in practice. See Michelson v. Cox, 476 F. Supp. 1350 (S.D. Iowa 1979). Even if a child were to originally move into the school district for the primary purpose of attending school, there is nothing on the face of the statute nor apparently in actual practice, to prohibit the child from being reclassified as a resident if in fact his circumstances--specifically his primary motive for being in the district--would

change from one school semester to another. In summary, therefore, the only students to whom the statutory definition of non-residency is in any sense irrebuttable are those students who persist in declaring that their primary purpose for being present in the school district is to attend the public free schools. Because such a declaration would ipso facto place the student within the classic legal definition of a non-resident, the Court concludes that it does no violence to the Constitution.

Plaintiffs further suggest, however, that the statute is discriminatory because only one category of students must defend its motives. In other words, a literal reading of Section 21.031(d), reflects that if a student under the age of eighteen years is living with his parents, legal guardian, or some person having lawful con-

trol of him under court order, then that student's purpose for being in the school district is unquestioned. It is only when a person under the age of eighteen years is living apart from a parent or guardian or other person [482 F. Supp. 221] having lawful control that he must establish the proper motive for being in the district. In resolving this contention, it is again necessary to recall the Court's earlier conclusion that this statute must only pass the rational basis test.

As stated in Dandridge v. Williams, 397 U.S. 471 (1970):

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The

> problems of government are practical ones and may justify, if they do not require, rough accomodations - illogical, it may be, and unscientific.' Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426." 397 U.S. at 485.

The Court concludes that in the present statutory scheme, there is some reasonable basis for separately classifying minor school children living apart from their parents, guardian or other person having custody under court order. Section 21.031(d) attempts to define "residence" for this one class of students. The word "residence" has many meanings in the law, largely determined by the statutory context in which it is used. Kelm v. Carlson, 473 F. 2d 1267, 1271 (6th Cir. 1973). Within the context of §21.031(d), residence means something more than mere physical

presence and thus is more closely related to the concept of domicile. See DeLeon v. Harlingen Consolidated Independent School District, 552 S.W.2d 922, 924 (Tex. Civ. App. - Corpus Christi 1977, no writ). The cases discussing the domicile of a minor are, therefore, extremely helpful in evaluating the reasonableness of this legislative classification. Under Texas common law, a minor is "not sui juris, and can neither select nor change its domicile, which is fixed by law as that of its father." Smith v. Ansley, 257 S.W. 2d 156, 157 (Tex. Civ. App. - Waco 1953, writ ref'd n.r.e.); see Bradshaw v. Peacock, 194 S.W.2d 551, 554 (Tex. Sup. Ct. 1946); Mills v. Howard, 228 S.W.2d 906, 907 (Tex. Civ. App. - Amarillo 1950, no writ); see generally Restatement of Conflicts of Law §11 (1934). This notion rests in large measure upon the minor's

presumed lack of capacity to form the requisite intention necessary to establish a separate domicile. Deterly v. Wells, 53 S.W.2d 847, 848 (Tex. Civ. App. - Dallas 1932, writ ref'd). Indeed, the common law presumption is so strong that even when a child is abandoned by both parents, he still cannot acquire his own domicile. See generally Restatement of Conflicts of Law §34 (1934) (where a child is abandoned by both parents it takes its father's domicile at the time of the abandonment). Since the child's ability in Texas to acquire his own separate residence is a matter of legislative grace[4]

4/ In the relatively new Texas Family Code, the Texas Legislature both codified and modified the common law in certain respects. For example, like the common law, a child's domicile is expressly defined as that of his parent. Texas Fam. Code Ann. § 12.04(Vernon Supp. 1978). Likewise if a managing conservator is appointed, his domicile establishes that of the child. Id. § 14.02. On the other hand, for venue purposes, while a child is deemed to (cont.)

it is certainly not unreasonable to require that his presence in another school district be for some cogent reason other than attending free [482 F.Supp. 222] public school in that district before qualifying for tuition-free status. See DeLeon v. Harlingen Consolidated Independent School District, supra, at 924.

Having concluded that Section 21.031 (d) does not create an invalid irrebuttable presumption against residency and having further concluded that there is some rational basis for defining the re-

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4/ (cont.) reside with its parents, guardian, manager conservator or other in lawful control, if it is found that the child is not under the care and control of any adult, then he resides where he is found. Id. § 11.04(c)(6). Thus "residence" is defined differently for venue purposes than for tuition-free purposes but these classifications are more properly left to the Legislature, and the courts will not interfere with its judgment unless the classification is patently unreasonable. See P. 221 supra.

sidency of minors living apart from a parent or guardian or other person in lawful control under court order, the only remaining question would be whether there is a rational basis for the statutory scheme which denies free public education to those who cannot meet the statutory definition of residency. Actually, Plaintiffs do not seriously challenge this aspect of the statute. A state has a legitimate interest in protecting and preserving the quality of its educational system and the right of its own bona fide residents to attend state schools on a preferred tuition basis. Vlandis v. Klein, supra, at Page 452-453. Similarly, the state would have an interest in preserving the financial integrity of the various components of the state educational system, i.e., the individual school districts. East Texas Guidance and Achievement Center,

Inc. v. Brockette, 431 F. Supp. 231, 236 (E.D. Tex. 1977). It must also be remembered that although the Plaintiffs in this case have concentrated their focus on children of United States citizens residing in Mexico, nevertheless the statute on its face would also apply to children of parents living anywhere in Texas or in any of the United States. Since the statute applies to any minor student living apart from his parents, guardian or other person with lawful control, it even applies to attempted transfers between different schools districts within the same county[5/]. The Court is satisfied

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5/ Since the statute is being attacked on its face, the fact that the statute facially applies to intra-state as well as inter-state movement, and indeed even to international movement, poses an additional barrier to Plaintiffs. Courts are reluctant to strike down a statute which can validly be applied to a number of situations. Arbeitman v. District Court, 522 F.2d.1031, 1034 (2d Cir. 1975).

that these kinds of transfers, free of all tuition, would cause budgetary and administrative planning problems sufficient to justify the tuition scheme of the statute. As stated in DeLeon v. Harlingen Consolidated Independent School District, supra:

> "The variability of student population is a serious impediment to the effective planning of virtually all phases of the educational process. There is no justification for a requirement that a school system educate in tuition-free manner those children whose only indicia of residence is mere presence within the district, accompanied by the student's desire (or that of his parents) to

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5/ (cont.) There is some question as to the existence of a constitutional right to intra-state travel and certainly as to whether infringement of such a right would have to pass the "compelling interest" test. Wright v. City of Jackson, 506 F.2d at 902; Wardwell v. Board of Education, 529 F.2d 625, 627 (6th Cir. 1976); Brown v. New Haven Civil Service Board, 474 F.Supp. 1256, 1264 (D.Conn. 1979). With respect to international travel, see Califano v. Aznavorian, 439 U.S. 170 (1978).

> attend school therein. It is reasonable to draw the line of residency, at least for school admission purposes, between those who come within a school district because they had to move into the district for some valid reason other than for educational purposes, and those who have come there for the sole purpose of getting tuition-free education within the district. There is no reason to add to the burdens of a school district by freely admitting to its schools anyone who has previously resided outside the district simply because they wanted to attend the schools in the district." 552 S.W.2d at 925.

In conclusion, the Court finds that Section 21.031(d) is a constitutional enactment of the Texas Legislature, in that it violates neither the equal protection clause nor the due process clause of the Fourteenth Amendment. This does not mean that the statute is perfect or that the Legislature could not have found a more precise or more equitable way to draw lines between resident and non-resident students. The Court simply concludes

that the statute as drawn is not unconstitutional. Accordingly, final judgment will be entered for Defendants.

DONE at Laredo, Texas, this 19th day of December, 1979.

/s/ George P. Kazen
United States District Judge

TEXAS EDUCATION CODE ANN. tit. 2

§21.031 (Vernon Supp. 1980)

§21.031 ADMISSION

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year to which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful

control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

(d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not

for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools.

(e) A child placed in foster care by an agency of the state or a political subdivision shall be permitted to attend the public free schools in the district in which the foster parents reside free of any charge to the faoster parents or the agency. No durational residence requirement may be used to prohibit such a child from fully participating in any activity sponsored by the school district.

Amended by Acts 1975, 64th Leg., p.896, ch. 334, §4, eff. Sept. 1, 1975; Acts 1977, 65th Leg., p. 1012, ch. 376, §1, eff. Aug. 29, 1977; Acts 1979, 66th Leg., p. 1125, ch. 537, §1, eff. June 11, 1979.

Joint Appendix

Office - Supreme Court, U.S.
FILED
AUG 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ORALIA MARTINEZ, as next friend
for ROBERTO MORALES

Petitioners,

v.

M. L. BROCKETTE, as TEXAS COMMISSIONER OF EDUCATION;
The TEXAS EDUCATION AGENCY;
The McALLEN INDEPENDENT SCHOOL DISTRICT; and
RODNEY CATHEY, as Superintendent of McAllen
Independent School District

Respondents.

On Writ Of Certiorari To
The Fifth Circuit Court Of Appeals

JOINT APPENDIX

JAMES A. HERRMANN
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
305 E. Jackson, Suite 206
Harlingen, Texas 78550

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
P.O. Box 2223
Hereford, Texas 79045
Counsel for Petitioners

TRAVIS HEISTER
ATLAS & HALL
Drawer 3725
McAllen, Texas 78501
Counsel for Respondents Cathey and McAllen I.S.D.

MARK WHITE
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548
Capitol Station
Austin, Texas 78711
Counsel for Respondents Brockette and Texas Education Agency

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TABLE OF CONTENTS

Page

RELEVANT DOCKET ENTRIES 1a

PLAINTIFFS AMENDED COMPLAINT 3a

ANSWER OF DEFENDANTS MISSION, MCALLEN, PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICTS 10a

ORDER DENYING PRELIMINARY INJUNCTION FILED AUGUST 25, 1978 ..... 19a

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DISTRICT COURT FILED DECEMBER 19, 1979 ..... 21a

JUDGMENT FILED DECEMBER 19, 1979 ..... 41a

OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS, JUNE 19, 1981 ..... 43a

EXHIBITS FROM TRIAL OF *ARREDONDO* V. *BROCKETTE*

PLAINTIFFS EXHIBIT 1
Plaintiffs Stipulated Testimony 53a

PLAINTIFFS EXHIBIT 2
Letter to Mr. and Mrs. Felipe Martinez from Rodney Cathey dated February 28, 1978 ..... 57a

PLAINTIFFS EXHIBIT 6
Texas Senate Education Committee Meeting Hearing on House Bill 247 March 25, 1977 ..... 58a

PLAINTIFFS EXHIBIT 7
Summary of McAllen School Reports 61a

DEFENDANTS EXHIBIT 1
Stipulations Concerning Defendants Testimony 63a

DEFENDANTS EXHIBIT 2
Testimony Before Texas House Committee On Public Education on House Bill 247 March 8, 1977 ..... 69a

DEFENDANTS EXHIBIT 3
Mexican Immigrant-Alien Student Study 1975-1976 by Jim B. Hensley (selected portions) 75a

ATTORNEY GENERAL OPINIONS
Dated July 12, 1973 and January 10, 1940 [These Opinions are reprinted in full in Defendants Reply to Petition for Writ of Certiorari at A-1 and A-7]

RELEVANT DOCKET ENTRIES

DISTRICT COURT

ARREDONDO V. *BROCKETTE*, B-77-296

Date	NR.	PROCEEDING
12/16/77	1	Original complaint filed
8/23/78	—	(Reynaldo G. Garza, District Judge) Hearing on Preliminary Injunction Held (Hearings in Chambers)
8/25/78	57	(Reynaldo G. Garza, District Judge) Order signed and entered. Ordered that Plaintiff's Motion For Preliminary Injunction B In all things denied
9/28/79	99	First Amended Complaint filed
10/26/79	—	*HEARING HELD on Motion for Preliminary Injunction/George P. Kazen, District Judge/Vela* . . . Motion to Dismiss Defendant Mission I.S.D. and Defendant Kenneth White GRANTED. Motion to dismiss Harlingen I.S.D. and Dan Ives as defendants. GRANTED. Motion to Consolidate with trial in Chief GRANTED. Plaintiffs' Exhibits 1 through 7 marked, offered and admitted. Defendants' Exhibits 1 through 4 marked, offered and admitted. (Clerk to mark 938 reports of McAllen I.S.D. as a whole package as Plaintiffs' exhibit No. 8). Oral arguments by Plaintiffs and Defendants heard. Rebuttal by each side. Hearing concluded at 12:35 p.m. Matter submitted. Parties to file briefs. Plaintiffs and Defendants Exhibits lists filed.

12/19/79	139	(George P. Kazen, District Judge) FINDINGS OF FACT AND CONCLUSIONS OF LAW filed.
12/19/79	140	(George P. Kazen, District Judge) FINAL JUDGMENT signed and filed, ORDERED that final judgment be entered in favor of the Defendants and that Plaintiffs' claim is DISMISSED.
1/3/80	141	Plaintiff NOTICE OF APPEAL from final judgment entered 12/19/79. Filed.
1/10/80	145	(George P. Kazen, District Judge) ORDER, filed. 1. Plaintiff Application for Injunction pending appeal—GRANTED as to Plaintiff Roberto Morales and DENIED as to Plaintiff Rita Gomez. 2. ORDERED that Defendant McAllen I.S.D. is restrained from refusing to permit Plaintiff Morales to attend McAllen I.S.D.; provided that Plaintiff give security in the sum of $1,224.00 and provided further that Plaintiff must increase the security of bond by an amount equal to the tuition charged for each quarter semester as in which Plaintiff continues to attend after the second quarter of the school year 1979-1980.

FIFTH CIRCUIT COURT OF APPEALS

ARREDONDO V. *BROCKETTE*, 80-1031

1/10/80	Appeal Docketed No. 80-1031
6/19/81	Opinion Rendered
8/13/81	Order Denying Rehearing and Rehearing En Banc

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C.A. No. B-77-296

MARIA ARREDONDO as next friend for ANDRES LOPEZ, JESUS CARRILLO as next friend for FIDEL ALVARES, MRS. ARTINO GARZA as next friend for DOLORES MICHELLE RODRIGUEZ, ORALIA MARTINEZ as next friend for DELIA and ROBERTO MORALES, FLORA FALCON as next friend for RITA GOMEZ, ANTONIO GUTIERREZ as next friend for SILVESTRE MARQUEZ LOPEZ and VICTORIA MARTINEZ as next friend for MARTA GUTIERREZ-GONZALEZ,

Plaintiffs

v.

M. L. BROCKETTE, Commissioner of Education in his official capacity, The TEXAS EDUCATION AGENCY, PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT, MCALLEN INDEPENDENT SCHOOL DISTRICT, MISSION INDEPENDENT SCHOOL DISTRICT, HARLINGEN INDEPENDENT SCHOOL DISTRICT, and ARTURO GUERRA, RODNEY CATHEY, KENNETH WHITE, and DAN IVES, individually and in their official capacities,

Defendants

FIRST AMENDED COMPLAINT

FILED
SEP 28 1979

INTRODUCTION

1. Plaintiffs in this action are United States citizens who have been denied free admission to public school in the State of Texas in violation of the 14th Amendment. Plaintiffs seek a declaration that Texas Education Code § 21.031(d) is unconstitutional on its face, an injunction, and restitution.

JURISDICTION

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3) and (4). The amount in controversy exceeds $10,000 exclusive of costs.

PLAINTIFFS

3. Plaintiff ANDRES LOPEZ is a United States citizen and a resident of Pharr, Texas. As a minor child he brings this suit through his next friend and grandmother Maria Arredondo with whom he lives in Pharr, Texas.

4. Plaintiff FIDEL ALVARES is a United States citizen and a resident of McAllen, Texas. As a minor child he brings this suit through his next friend Jesus Carrillo with whom he lives in McAllen, Texas.

5. Plaintiff DOLORES MICHELLE RODRIGUEZ is a United States citizen and a resident of Mission, Texas. As a minor child she brings this suit through her next friend and aunt Mrs. Artino Garza with whom she lives in Mission, Texas.

6. Plaintiffs DELIA and ROBERTO MORALES are United States citizens and residents of McAllen, Texas. As minor children they bring this suit through their next friend and sister Oralia Martinez with whom they live in McAllen, Texas.

7. Plaintiff RITA GOMEZ is a United States citizen and a resident of Pharr, Texas. As a minor child she brings this suit through her next friend and sister Flora Falcon with whom she lives in Pharr, Texas.

8. Plaintiff Silvestre Marquez Lopez is a United States citizen and a resident of Harlingen, Texas. As a minor child he brings this suit through his next friend and godfather Antonio Gutierrez with whom he lives in Harlingen, Texas.

9. Plaintiff MARTA GUTIERREZ-GONZALEZ is a United States citizen and resident of Harlingen, Texas. As a minor child she brings this suit through her next friend and

aunt Victoria Martinez with whom she lives in Harlingen, Texas.

DEFENDANTS

10. Defendant TEXAS EDUCATION AGENCY (hereinafter TEA) is an administrative agency of the State of Texas. Its chief executive official is Defendant Dr. M. L. BROCKETTE, Commissioner of Education. TEA is responsible for the disbursement of the Available School Fund which pays the cost of providing free public education in Texas school districts.

11. The Defendants MCALLEN, MISSION, PHARR-SAN JUAN-ALAMO and HARLINGEN INDEPENDENT SCHOOL DISTRICTS provide free public education to eligible residents in their districts with funds from the Available School Fund administered by TEA.

12. Defendants ARTURO GUERRA, RODNEY CATHEY, KENNETH WHITE, and DAN IVES are the Superintendents of the PHARR-SAN JUAN-ALAMO, MCALLEN, MISSION, and HARLINGEN Independent School Districts respectively. They are sued in their individual and official capacities.

FACTS

13. Each of the Plaintiffs is a resident of a Texas School District and lives with an adult who is not the child's parent or legal guardian.

14. In the fall of 1977 Plaintiffs LOPEZ, ALVARES, RODRIGUEZ, and MORALES applied for tuition free admission to the public school in the district in which each resided.

15. Each of the Defendant School Districts denied these Plaintiffs free admission to the public schools pursuant to Tex. Ed. Code § 21.031(d) because they were in the Defendant school districts for the purpose of attending school.

16. On November 16, 1978 Oralia Martinez as next friend for her brother ROBERTO MORALES paid $376.00 in tuition money to McAllen I.S.D. in order to enroll Roberto in that district for the second quarter of 1978-1979.

17. By letter of March 9, 1979, Defendant McAllen I.S.D. advised Plaintiff Roberto Morales' attorney that tuition for the third quarter of 1978-1979 was due and owing. That bill was for $376.00.

18. Plaintiffs Silvestre Marquez Lopez and Marta Gutierrez-Gonzalez applied for admission to the Harlingen I.S.D. in August, 1979. Defendant Harlingen I.S.D. denied them admission pursuant to Tex. Ed. Code § 21.031(d) because they were in the school district for the primary purpose of attending school.

19. Plaintiff RITA GOMEZ applied for admission to the Pharr-San Juan-Alamo I.S.D. in August, 1979. She was admitted to school, but, pursuant to Tex. Ed. Code § 21.031(d), only on the condition her sister obtain guardianship over her and only after an attorney informed the school guardianship was being sought.

20. None of the adults with whom Plaintiffs reside can afford to, or desire to obtain legal guardianship over the children in their care.

CAUSE OF ACTION

21. Defendants have violated Plaintiffs rights to due process, equal protection, and the privileges and immunities of citizenship by refusing Plaintiffs admission to school pursuant to Tex. Ed. Code § 21.031(d) which is an unconstitutional statute in that:

a. By burdening the right to travel freely among the states it violates the privileges and immunities clause of the Constitution and the 14th Amendment.

b. By defining residency for school purposes in terms of purpose for residency it creates an invalid irrebuttable presumption of non-residency which violates the

due process and equal protection clauses of the 14th Amendment.

22. Plaintiffs are entitled to redress for these violations under 42 U.S.C. § 1983.

INJUNCTIVE RELIEF

23. Plaintiffs are suffering and will continue to suffer immediate and irreparable harm if they continue to be excluded from school pursuant to Tex. Ed. Code § 21.031(d). They have no adequate remedy at law.

PRAYER

WHEREFORE, Plaintiffs pray that this Court:

1. Enter a Declaratory Judgment that Tex. Ed. Code § 21.031(d) violates the due process, equal protection, and privileges and immunities clauses of the 14th Amendment in that it infringes on the right to travel among the states and creates an invalid irrebuttable presumption of non-residency.

2. Enter a preliminary and permanent injunction enjoining Defendants from denying Plaintiffs admission to school pursuant to Tex. Ed. Code § 21.031(d).

3. Grant Plaintiff Roberto Morales restitution in the amount of $376.00 plus interest for the tuition money paid by him to McAllen Independent School District, and declare that the tuition bill of March 9, 1979 is not a void debt.

4. Award Plaintiffs costs and reasonable attorneys fees.

5. Grant such other relief as this Court deems just and proper.

Respectfuliy submitted,

/s/ Edward Tuddenham
EDWARD TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
P.O. Box 2223
1406 W. Hwy. 60
Hereford, Texas 79045
(806) 364-3961

OF COUNSEL:

/s/ itlDavid Horton
DAVID HORTON
TIMOTEO E. GOMEZ
TEXAS RURAL LEGAL AID, INC.
Samano Security Bldg., 5th Floor
1154 E. Elizabeth Street, Rm. 501
Brownsville, Texas 78520
(512) 546-5558

Local Counsel

JAMES HERRMANN
TEXAS RURAL LEGAL AID, INC.
305 E. Jackson, Suite 206
Harlingen, Texas 78550
(512) 423-3111

GEORGE POWELL
TEXAS RURAL LEGAL AID, INC.
216 N. Closner
Edinburg, Texas 78539
(512) 383-5673

CERTIFICATION PURSUANT TO LOCAL RULE 16(H)

I, David Horton, Local Counsel for Plaintiffs, spoke personally with Mr. Gregg Wilson, who stated he would oppose this motion; Mr. Neal King, who stated that he would not oppose this motion; Mr. Travis Hiester, who stated that he would oppose; and Mr. Mario Ramirez, who stated he would not oppose this motion.

Dated: 9/21/79, 1979.

/s/ D Horton
DAVID HORTON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. B-77-296

MARIA ARREDONDO, as next friend for ANDRES LOPEZ, *et al*
Plaintiffs

v.

M. L. BROCKETTE, Commissioner of Education in his official capacity, *et al.*
Defendants

FILED
Jan 24 1978

ANSWER OF DEFENDANTS, MISSION INDEPENDENT SCHOOL DISTRICT, MCALLEN INDEPENDENT SCHOOL DISTRICT, PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT, AND DR. KENNETH WHITE, RAFAEL CANTU, RODNEY CATHEY, RICARDO R. CHAPA, AGUSTO GUERRA, ERNESTO ALVARDO, AND HERALDO PENA

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Mission Independent School District, McAllen Independent School District, Pharr-San Juan-Alamo Independent School District, and Dr. Kenneth White, Rafael Cantu, Rodney Cathey, Ricardo R. Chapa, Agusto Guerra, Ernesto Alvardo, and Heraldo Pena, individually and in their official capacities, Defendants in the above styled and numbered cause and file this, their answer, to the complaint filed herein by Plaintiffs and would respectfully show unto the Court as follows:

1. These Defendants admit that the action brought herein is against the Texas Education Agency and members of the Board of Trustees of the Pharr-San Juan-Alamo Independent

School District, Mission Independent School District, McAllen Independent School District and Eagle Pass Independent School District and that the Defendants are various school officials but these Defendants have no knowledge or information sufficient to form a belief regarding the truth of the remaining allegations of paragraph 1 of the complaint.

2. These Defendants admit Plaintiffs seek injunctive and declaratory relief, however, the Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations that Plaintiff and all class members are all citizens of the United States.

3. The Defendants deny that jurisdiction on this case is based upon 28 U.S.C. § 1331, 2201, 2202, 42 U.S.C. 1983 and the 14th Amendment of the United States Constitution, however, Defendants admit that jurisdiction can be based on 28 U.S.C. § 1343(3).

4. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 4 of the complaint.

5. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 5 of the complaint.

6. These Defendants admit Andres Lopez is 8 years of age and admit he brings this suit by next friend and grandmother, Mrs. Maria Arredondo.

7. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 7 of the complaint.

8. These Defendants admit the allegations contained in paragraph 8 of the complaint, however, subsequently Andres Lopez was permitted to register and now attends Pharr-San Juan-Alamo Independent School District.

9. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 9 of the complaint.

10. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 10 of the complaint.

11. These Defendants admit that Fidel Alvares brings this suit by his next friend, Mr. Jesus Carrillo, that he was living with Mr. Carrillo in McAllen at the time he attempted to register in McAllen Independent School District, that he was not permitted to register in McAllen Independent School District in the Fall of 1977 and that at the time registration was attempted, Mr. Carrillo was informed by Dr. Ricardo Chapa that registration would not be permitted because the child's parents did not live in the McAllen Independent School District and he did not have a guardian. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the remaining allegations of paragraph 11 of the complaint.

12. These Defendants admit the allegations contained in paragraph 12 of the complaint.

13. Defendants admit that the Plaintiff Dolores Michelle Rodriguez is an American citizen, that she is 13 years of age, and that she lives with Mrs. Artino Garza who brings this suit as her next friend. Defendants deny that Dolores Michelle Rodriguez has lived in Mission since July, 1975, or that she last lived in California prior to coming to Mission. Defendants have not sufficient knowledge or information to form a belief as to the truth of the averments of the place of the birth of the child, or of her residence prior to July, 1975.

14. Defendants admit that Mrs. Artino Garza is the aunt of Dolores Michelle Rodriguez. Defendants have not sufficient knowledge or information to form a belief as to the truth of the other averments of paragraph 14 of the complaint.

15. Defendants deny that the Plaintiff child came to live with her aunt in July, 1975. Defendants have not sufficient knowledge or information to form a belief as to the truth of the other averments of paragraph 15 of the complaint.

16. Defendants admit the averments of paragraph 16 of the complaint with this qualification: Rafael Cantu has no recollection of the conversation with the Plaintiff child or Mrs. Garza, but he routinely tells applicants in the Plaintiffs' position what Plaintiffs aver that he told them.

17. Defendants admit the averments of paragraph 17 of the complaint.

18. These Defendants admit Plaintiff, Delia Morales brings this suit by her next friend, Oralia Martinez, her sister, and that she resided with her sister in September, 1977, however, these Defendants have no knowledge or information sufficient to form a belief regarding the truth of the remaining allegations contained in paragraph 18 of the complaint.

19. These Defendants admit the allegations contained in paragraph 19 of the complaint.

20. These Defendants admit the allegations contained in paragraph 20 of the complaint.

21. These Defendants have no knowledge or information sufficient to form a belief regarding the truth or the allegations contained in paragraph 21 of the complaint.

22. These Defendants admit Roberto Morales is a minor and that this suit is brought by his next friend, his sister, Oralia Martinez, who he lives with in the McAllen Independent School District, however, these Defendants have no knowledge or information sufficient to form a belief regarding the truth of the remaining allegations contained in paragraph 22 of the complaint.

23. These Defendants admit the allegations contained in paragraph 23 of the complaint.

24. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations contained in paragraph 24 of the complaint.

25. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations contained in paragraph 25 of the complaint.

26. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations contained in paragraph 26 of the complaint.

27. These Defendants admit the allegations contained in paragraph 27 of the complaint.

28. These Defendants admit the allegations contained in paragraph 28 of the complaint.

29. These Defendants admit the allegations contained in paragraph 29 of the complaint.

30. These Defendants admit the allegations contained in paragraph 30 of the complaint.

31. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations contained in paragraph 31 of the complaint.

32. These defendants deny the allegations contained in paragraph 32 of the complaint.

33. Defendants deny that their employees and agents have refused to register all the named Plaintiffs and class members within their respective school district and would show at least two of the named Plaintiffs are registered, one in the McAllen Independent School District and one in the Pharr-San Juan-Alamo Independent School District. Defendants further state that certain members of the class have, from time to time, been permitted to register in the respective school district. Defendants deny that they have made the registration of Plaintiffs and their class members contingent upon having a court appointed guardian or parents living within the school district but merely have followed the provisions of the Texas Education Code

regarding registration requirements of students. These Defendants admit that certain Plaintiffs and class members have been permitted to register subject to certain conditions which may include initiating and completing a legal guardianship proceeding but affirmatively state that there are other procedures available to Plaintiffs and members of their class they purport to represent in obtaining admission to their school districts.

34. These Defendants admit the allegations contained in paragraph 34 of the complaint.

35. These Defendants admit the allegations contained in paragraph 35 of the complaint.

36. These Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations contained in paragraph 36 of the complaint.

37. These Defendants incorporate by reference their answer contained in paragraphs 1 through 36 as set forth above.

38. These Defendants deny the allegations contained in paragraph 38 of the complaint.

39. These Defendants incorporate by reference their answer contained in paragraphs 1 through 36 as set forth above.

40. These Defendants deny the allegations contained in paragraph 40 of the complaint.

41. These Defendants incorporate by reference their answer contained in paragraphs 1 through 36 as set forth above.

42. These Defendants deny the allegations contained in paragraph 42 of the complaint.

43. These Defendants deny the allegations contained in paragraph 43 of the complaint.

44. These Defendants deny the allegations contained in paragraph 44 of the complaint.

45. These Defendants deny the allegations contained in paragraph 45 of the complaint.

46. These Defendants deny the allegations contained in paragraph 46 of the complaint.

47. These Defendants incorporate by reference their answer contained in paragraphs 1 through 36 as set forth above.

48. These Defendants deny the allegations contained in paragraph 48 of the complaint.

49. These Defendants incorporate by reference their answer contained in paragraphs 1 through 36 as set forth above.

50. These Defendants deny the allegations contained in paragraph 50 of the complaint.

51. These Defendants incorporate by reference their answer contained in paragraphs 1 through 36 as set forth above.

52. These Defendants deny the allegations contained in paragraph 52 of the complaint.

53. These Defendants incorporate by reference their answer contained in paragraphs 1 through 36 as set forth above.

54. These Defendants deny the allegations contained in paragraph 54 of the complaint.

55. These Defendants deny the allegations contained in paragraph 55 of the complaint.

56. These Defendants specifically state that Plaintiffs will suffer no irreparable injury as a result of Defendants' actions herein.

57. Further pleading herein, these Defendants would show the Court that granting a temporary or preliminary injunction herein would drastically change the status quo and, in effect, grant Plaintiffs and members of their class the entire relief sought by them, requiring these Defendants to admit Plaintiffs and all members in the class defined by Plaintiffs would result in irreparable injury to these Defendants. This would cause extreme overcrowding of classes, which are presently overcrowded at times, require additional facilities, curriculum, teachers and many other expenses at a time that is in the middle of a school year when the school is operating under the budget and tax rate set for the school district during the Summer of 1977.

58. By not seeking a determination by the Board of Trustees as required by § 21.031(d) of the Texas Education Code, the Plaintiffs have failed to exhaust their administrative remedies and should not be permitted to bring this action without first adhering to the administrative procedure set forth in that statute.

59. The portions of the statute questioned by Plaintiffs consists of a legislative classification which is not arbitrary or invidious. It has a reasonable, rational and/or even compelling basis for its existence. The constitutional analysis of these portions of the statute should not be strict as the rights affected therein are not among the rights afforded explicit or implicit protection by the United States Constitution.

60. The statute is applied equally to the residents and non-residents of the State of Texas, the only restriction being school district boundaries rather than state or national boundaries and, therefore, are not violative of any provision contained in the United States Constitution or 42 U.S.C. 1983.

61. Since Plaintiffs and members of their class are sent to various Texas Free School Districts for the primary purpose of attending public schools situated therein, their residence in the school district is not bona fide. The residence of a minor is

normally that of its parents who, in this case, Plaintiffs allege reside outside the state of Texas.

62. Defendants, Dr. Kenneth White, Rafael Cantu, Rodney Cathey, Ricardo R. Chapa, Agusto Guerra, Ernesto Alvardo and Heraldo Pena state that they are public officials, employed by their respective school districts and are exercising discretion in the performance of their duties. Any action they have taken with regard to admission or registration at their respective school districts has been in good faith belief that they were adhering to all applicable state and federal statutes, laws and regulations and the United States Constitution.

WHEREFORE, these Defendants pray that upon hearing, this Court deny Plaintiffs application for preliminary injunction and deny the declaratory judgment and injunctive relief sought by Plaintiffs and for such further relief, general or special, in law or in equity to which they may show themselves entitled to receive.

Respectfully submitted,

ATLAS, HALL, SCHWARZ, MILLS,
GURWITZ & BLAND

/s/ By: Travis Heister
TRAVIS HEISTER
Attorneys for McAllen Independent
School District

KING, WAITE AND GUERRA

/s/ By: Neal King
NEAL KING
Attorneys for Mission Independent
School District

/s/ Mario Ramirez
MARIO RAMIREZ
Attorney for Pharr-San Juan-Alamo
Independent School District

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. B-77-296

MARIA ARREDONDO as next friend for ANDRES LOPEZ, *et al*
Plaintiffs

v.

DR. M. L. BROCKETTE, Commissioner of Education, in his official capacity, *et al.*
Defendants

FILED
Aug 25 1978

ORDER

On the 25th day of August, 1978, this Court convened a hearing in the above-styled and numbered cause in order to determine whether or not to issue a preliminary injunction as requested by the Plaintiffs. After a careful review of the school district reports on file, the arguments and briefs of all counsel and the applicable law, it is this Court's opinion that no injunction should issue, since Plaintiffs have failed to demonstrate a substantial likelihood of success on the merits. See *Barrett* v. *Roberts*, 551 F.2d 662, 665 (5th Cir. 1977).

In Order for this Court to grant the preliminary injunction Plaintiffs seek, it would of necessity have to hold the state statute involved herein to be unconstitutional. The Plaintiffs want this Court to allow United States citizens who come to school districts in Texas to live with relatives such as grandparents, brothers, sisters, aunts or uncles to attend school even when the school board involved, under the provisions of the statute, makes a finding that the child has moved into the school district away from parents or legal guardians for the

sole purpose of attending school. This Court is not prepared to do so on the basis of the record presently before it.

The state has a valid interest in wanting to educate children who are legitimate residents of a school district. This being so, this Court cannot pick and choose and exempt one group from this requirement.

While at first blush the requirement that a child who has a legal guardian residing within the district must be admitted to school seems to lack any rational basis, the fact that parents have lost control over their child by permitting such control to pass to a legal guardian and that the legal guardian is then the one responsible for such a child creates a rational and reasonable basis for the requirement.

An analysis of the reports of the school districts submitted since the first hearing in this case shows that the school boards of the districts before the Court have been more than liberal in finding that certain children are not living away from parents and residing in the school district for the sole purpose of attending school. Such analysis shows conclusively that children living within the school districts with someone other than their parents or legal guardians will be admitted to school if *any* reason exists for such situation other than that of attending school only.

Based upon the above, it is hereby

ORDERED that Plaintiffs' Motion for Preliminary Injunction be in all things DENIED.

A copy of this Order shall be sent by the Clerk to all counsel.

DONE at Brownsville, Texas, on this the 25th day of August, 1978.

/s/ Reynaldo G. Garza
REYNALDO G. GARZA
United States District Judge

MARIA ARREDONDO as next friend for ANDRES LOPEZ, JESUS CARRILLO as next friend for FIDEL ALVARES, MRS. ARTINO GARZA as next friend for DOLORES MICHELLE RODRIGUEZ, ORALIA MARTINEZ as next friend for DELIA and ROBERTO MORALES, FLORA FALCON as next friend for RITA GOMEZ, ANTONIO GUTIERREZ as next friend for SILVESTRE MARQUEZ LOPEZ, and VICTORIA MARTINEZ as next friend for MARTA GUTIERREZ-GONZALEZ,

Plaintiffs

v.

M. L. BROCKETTE, Commissioner of Education in his official capacity, The TEXAS EDUCATION AGENCY, PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT, McALLEN INDEPENDENT SCHOOL DISTRICT, MISSION INDEPENDENT SCHOOL DISTRICT, HARLINGEN INDEPENDENT SCHOOL DISTRICT, and ARTURO GUERRA, RODNEY CATHEY, KENNETH WHITE, and DAN IVES, individually and in their official capacities,

Defendants

Civ. A. No. B-77-296

UNITED STATES DISTRICT COURT,
S.D. TEXAS,
BROWNSVILLE DIVISION
DEC. 19, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KAZEN, District Judge.

As will be more fully detailed below, the instant suit was originally filed asking the Court to declare unconstitutional a state statute and to enjoin the attempted enforcement of same. A hearing was held on October 26, 1979, at which time evidence on the merits was received. Pursuant to Rule 52, Federal

Rules of Civil Procedure, the Court now submits its Findings of Fact and Conclusions of Law. Virtually all of the findings of fact are based upon stipulations made between the parties.

FINDINGS OF FACT

1. Both Plaintiff Roberto Morales and Plaintiff Rita Gomez are United States citizens.

2. Each child is over five years of age and under eighteen years of age.

3. Plaintiff Roberto Morales lives within the McAllen Independent School District for the primary purpose of attending school and learning English.

4. Plaintiff Rita Gomez lives within the Pharr-San Juan-Alamo School District for the primary purpose of attending school.

5. Neither Plaintiff resides with his or her parent, legal guardian, or other person having lawful control of him under a court order.

6. Neither Plaintiff has a parent, legal guardian, or other person having lawful control of him residing in the McAllen or Pharr-San Juan-Alamo School Districts.

7. Both Plaintiffs would otherwise be eligible for admission to the public free schools under the provisions of the Tex. Educ.Code Ann. tit. 2, § 21.031(c) (Vernon Supp. 1978), which provides:

> The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

8. Both Plaintiffs were denied admission to the Texas free schools under the provisions of Tex.Educ.Code Ann. tit. 2, § 21.031(d) (Vernon Supp. 1978), which provides:

> In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools.

9. Plaintiff Roberto Morales began living in McAllen Independent School District at the beginning of the 1977 school year and has continuously resided there since that time.

10. Plaintiff Roberto Morales only intends to reside in the McAllen Independent School District until he completes his education.

11. While Plaintiff Roberto Morales was denied admission to the McAllen Independent School District in 1977 and 1978, he was granted permission to attend school in November, 1978, contingent upon the payment of tuition. (*See* Pl.Exh. No. 2).

12. Plaintiff Roberto Morales and the person with whom he is residing are both indigent.

13. In November, 1978, tuition in the amount of $378.00 was paid on behalf of Plaintiff Roberto Morales by the Texas Rural Legal Aid, Inc. The parties apparently dispute whether these funds were those of the corporation itself or whether they were actually furnished by the family of Morales. Insufficient evidence was presented to enable the Court to resolve this point but the Court regards the issue as irrelevant to the ultimate disposition of the case. (Pl.Exh. No. 3).

14. Plaintiff Roberto Morales has not paid tuition for the Spring, 1978, or Fall, 1979, semesters and he was originally

informed that his continued enrollment was conditioned upon the payment of all monies due and the availability of space.

15. Plaintiff Roberto Morales was expelled from school on November 28, 1978, for failure to pay tuition. On December 12, 1979, this Court issued a preliminary injunction returning him to school conditioned upon his first posting a bond in the sum of $1,224.00 to secure Defendant McAllen School District's claims for tuition against Plaintiff. The Plaintiff is now in school pending ultimate determination of this case on the merits.

16. Plaintiff Rita Gomez only intends to reside in the Pharr-San Juan-Alamo School District until she completes her education.

17. Plaintiff Ritz Gomez was denied admission to school for the 1979-80 school year by officials of the Pharr-San Juan-Alamo School District.

18. Plaintiff Ritz Gomez and the person with whom she is residing are both indigent.

19. Plaintiff Delia Morales, a United States citizen and the sister of Plaintiff Roberto Morales, was also denied admission to the McAllen Independent School District, pursuant to § 21.031(d). She was then admitted upon paying tuition, but subsequently withdrew from school and returned to Mexico. Her tuition was refunded by the McAllen School District. *See* (Pl.Exh. 5).

20. According to admissions contained in the pleadings, Plaintiff Fidel Alvares, a United States citizen, was also denied admission to the McAllen Independent School District, pursuant to § 21.031(d), but no further evidence was presented either in support of or in opposition to his claim.

21. According to the pleadings, Plaintiff Andres Lopez, a United States citizen, was originally denied admission to the Pharr Independent School District, pursuant to § 21.031(d), but was subsequently admitted. No further evidence was presented either in support of or in opposition to his claim.

22. Prior to trial, the Plaintiffs voluntarily dismissed their cause of action as to Defendants Harlingen Independent School District and Dan Ives. The dispute of Plaintiffs Silvestre Marquez Lopez and Marta Gutierrez-Gonzalez was with these Defendants; therefore, their claims will not be adjudicated herein.

23. Prior to trial, Plaintiffs moved and were granted permission to dismiss, without prejudice, their cause of action against Defendants Mission Independent School District and Kenneth White. Since, according to the motion, no known Plaintiffs are currently being excluded from the district, the claim of Plaintiff Dolores Michelle Rodriguez has been rendered moot and incapable of adjudication.

24. None of the adults with whom the Plaintiffs reside desire to become the legal guardian or legal custodian of the child who lives with them.

25. The Texas statute in question operates to absolutely deprive a child of an education if it is determined that the child resides apart from his or her parent, legal guardian or one having lawful control over him or her for the primary purpose of attending the free public school and that child is indigent.

26. If Section 21.031(d) of the Texas Education Code were declared unconstitutional, it would, in all probability, cause the immediate enrollment of thousands of children from other states and countries who are United States citizens whose parents do not reside within the relevant school district. Furthermore, the enrollment would probably increase significantly each year.

27. The legislative classification imposing the residency requirement applies to intrastate school district transfers as well as transfers of children from other states and countries.

28. Declaring the statute unconstitutional would cause substantial numbers of intra-district transfers, which would further cause school populations to fluctuate. Also, the intrastate migration of students between school districts would

cause problems in the athletic programs by possibly encouraging the recruitment of athletes.

29. Fluctuating school populations would make it impossible to predict enrollment figures—even on a semester-by-semester basis, causing over-or-under-estimates on teachers, supplies, materials, etc.

30. The increased enrollment of students would cause overcrowded classrooms and related facilities; over-large teacher-pupil ratios; expansion of bilingual programs; the purchase of books, equipment, supplies and other customary items of support; all of which would require a substantial increase in the budget of the school districts.

31. Neither the State of Texas nor the Texas Education Agency nor the United States of America provides funds to assist school districts with educating Plaintiffs or children similarly situated. This burden falls exclusively upon the local school district.

32. Some school districts are presently taxing at the maximum rate allowed by law and have no means to obtain more financial assistance.

33. Most of the children in the Plaintiffs' category do not pay any local school or state taxes or tuition and, therefore, their education would be funded and paid for by the resident taxpayers of the State of Texas and the school district, including some of the adults the children live with in the school district.

34. The intrastate and interstate transfers would, in all probability, have a detrimental effect on the educational standards of the Defendant school districts and the other school districts in the State of Texas.

35. The children in this case live with persons who could, in the absence of notice to the contrary, consent to medical treatment for the minor. *See* Tex.Fam.Code Ann. § 35.01(2) (Vernon 1975).

36. The statutory definition contained in Section 21.031(d) was passed to give administrators a statutory guideline to follow in determining a genuine bona fide resident.

37. At least one of the legislative purposes behind Section 21.031(d) was to inhibit the migration of persons residing in Mexico to attend schools in the United States. (*See* Pl.Exh. 6).

38. Between August 1, 1977, and May 25, 1978, out of a total of fifty-six minor United States citizens living apart from their parents, legal guardian or other person having lawful control over them, who applied for admission to the McAllen Independent School District, fifty-one of these children were admitted.

39. In denying an earlier Motion for a Preliminary Injunction, then-presiding Judge Reynaldo Garza found that the Defendant school districts had been most liberal in finding that certain children, like the Plaintiffs, are not living away from their parents or residing in the school districts for the sole purpose of attending school. Judge Garza further found that analysis of the records submitted in this case conclusively showed that children living within the school districts with someone other than their parents or legal guardians will be admitted to school if any reason exists for such situation other than solely attending school. This Court has no reason to doubt the accuracy of these findings and they are adopted for purposes of this Opinion.

40. The parties have specifically limited this case to the issue of the facial constitutionality of Tex.Educ.Code Ann. § 21.031(d).

41. On October 26, 1979, it was agreed in open court that the Plaintiffs' Motion for a Preliminary Injunction would be consolidated into a final hearing on the merits. *See generally* Fed.R.Civ.P. 65(a)(2).

42. In the event that any of the foregoing findings of fact also constitute conclusions of law, they are adopted as such. In the event that any of the following conclusions of law also constitute findings of fact, they are adopted as such.

CONCLUSIONS OF LAW

This case presents the very narrow issue of whether Tex.Educ.Code Ann. § 21.031(d) is unconstitutional on its face. Earlier in this case, Plaintiffs specifically requested and were granted permission to amend their complaint to eliminate any contention that the statute was unconstitutional as applied to them. The minor Plaintiffs are United States citizens residing within Texas and living apart from their parents, legal guardian or other person having lawful control over them. These children desire to attend public schools on a tuition-free basis. The Defendant school districts have refused to admit the children tuition-free, having determined that the Plaintiffs are living apart from their parents, legal guardian or other person having lawful control over them by court order for the primary purpose of attending the free public schools. *See* Tex.Educ.Code Ann. § 21.031(d) (Vernon Supp. 1978).

This Court first notes that as a general rule the Constitution "does not invalidate state legislation because it fails to embody the highest wisdom or provide the best conceivable remedies." *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U.S. 541, 550-51, 69 S.Ct. 1221, 1227-1228, 93 L.Ed. 1528, 1538 (1949). This Court's task is thus not to weigh a statute's effectiveness but its constitutionality. *James* v. *Strange*, 407 U.S. 128, 133, 92 S.Ct. 2027, 2030, 32 L.Ed.2d 600, 606 (1972) (rational basis test applied). Furthermore, the fact that an inequitable result may be forthcoming does not render a statute unconstitutional. *See Wickard* v. *Filburn*, 317 U.S. 111, 129-30, 63 S.Ct. 82, 91, 87 L.Ed. 122, 137 (1942).

As Plaintiffs candidly recognize, any statute is the result of a legislative choice that inevitably affects one group differently from others and, therefore, gives rise to claims of unequal treatment. Whether such statute is unconstitutional under the equal protection clause is generally determined by the "rational basis test"; that is, the statute is entitled to a presumption of validity and will be upheld so long as it bears some rational relationship to the achievement of a legitimate purpose. *San*

Antonio School District v. *Rodriguez*, 411 U.S. 1, 40, 93 S.Ct. at 1300, 1278, 36 L.Ed.2d 16 at 47 (1973). On the other hand, if a statute involves "suspect classifications" or if it interferes with a fundamental right explicitly or implicitly protected by the Constitution, then the statute must withstand "strict judicial scrutiny." It is not entitled to the usual presumption of validity, and the statute must fail unless it is necessary to promote a compelling state interest. *Id.* at 16-17, 93 S.Ct. 1287-88, 36 L.Ed.2d 32-33. Plaintiffs rightfully do not contend that the statute in question involves any suspect classifications, as it applies on its face to all students of whatever race, sex, or national origin.[1] Further, this statute involves secondary education and the Plaintiffs recognize that while education is unquestionably vital, the Supreme Court has held that it is not among the rights afforded explicit or implicit protection under the Constitution. *Id.*, at 35, 93 S.Ct. at 1297, 36 L.Ed.2d at 44. In an effort to bring this statute within the much stricter "compelling interest" test, Plaintiffs allege that the statute improperly burdens their fundamental constitutional right to travel, and they thereby seek relief under the umbrella of such decisions as *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) and *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974).

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[1] The United States Supreme Court has identified numerous suspect classifications. For example, racial classifications and classifications based on alienage are deemed suspect and subject to "strict scrutiny." *See Graham* v. *Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage); *Loving* v. *Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (race); *McLaughlin* v. *Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d (1964)(race). Although sexual classifications were held to be suspect in one case, *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), recent cases evidence a retrenchment from this position and the application by the Supreme Court of an intermediate scrutiny. *See Orr* v. *Orr*, 440 U.S. 268, 278-79, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306, 318-19 (1979).

Shapiro, supra, affirmed lower court decisions declaring unconstitutional those statutes denying welfare assistance to residents of a state who had not resided within their jurisdiction for at least one year immediately preceding the application for assistance. The Court found that the statutes penalized the exercising of a constitutional right to interstate travel and, therefore, failed because they were not necessary to promote a compelling state interest. *Memorial Hospital, supra*, announced a similar result with respect to a statute requiring a one-year's residence as a condition to receiving non-emergency hospital or medical care at county expense. There is a fundamental and critical difference, however, between the statutes involved in those cases and the statute before this Court. The Supreme Court has made it crystal clear that the defect in the *Shapiro* and *Memorial Hospital* statutes was *not* that they had residency requirements but that they had *durational* residency requirements.

In *Shapiro, supra*, the Court clearly noted that residency and one-year residency were two separate and distinct prerequisites for welfare assistance. 394 U.S. at 636, 89 S.Ct. at 1332, 22 L.Ed.2d at 616. Later, in *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), a case concerning a durational residency requirement for voting, the Court again applied the compelling interest rule. However, the Court made it clear that the challenge was not directed at the requirement of residency but rather at the requirement of durational residency. "We emphasize again the difference between bona fide residence requirements and durational residence requirements." 405 U.S. at 343, 92 S.Ct. at 1003-1004, 31 L.Ed.2d at 284. This distinction was more clearly defined in *Memorial Hospital, supra*, where the Court reemphasized that the constitutional right to interstate travel did not mean merely the right to be in motion but rather the right to migrate, resettle, and start a new life. 415 U.S. at 255, 94 S.Ct. at 1080, 39 L.Ed.2d at 313. The Court concluded that while every bona fide residence requirement would necessarily burden a simple right to move from one location to another, it was only a

durational residency requirement that impermissibly burdened the constitutional right "to migrate, 'with intent to settle and abide.' " *Id.* More recently, in *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed.2d 366 (1976) (per curiam), the Court repeated that: "We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration." 424 U.S. at 647, 96 S.Ct. at 1155, 47 L.Ed.2d at 369.

The Fifth Circuit Court of Appeals has also recognized this distinction in upholding an ordinance requiring all municipal employees to maintain their domicile and principal place of residence within the corporate limits of the city during the period of their employment. *Wright* v. *City of Jackson*, 506 F.2d 900 (5th Cir. 1975). Noting that there is no fundamental constitutional "right to commute," the Fifth Circuit held that a bona fide continual residency requirement is not to be tested by the strict compelling purpose standard but rather by the traditional rational basis test. Similarly, in *Andre* v. *Board of Trustees of Village of Maywood*, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978), the court noted:

> All residency restrictions have an effect on the right to interstate travel, but only those residency restrictions which can be characterized as 'durational' have been found to unconstitutionally impinge or penalize the right to travel, in the absence of some compelling state interest. Durational residency requirements classify residents into groups of residents who have fulfilled the residency requirements and those who have not . . . Bona fide residency requirements as continuing conditions of municipal employment rest upon footings significantly different from those of durational residency requirements.

561 F.2d at 52.

In the instant case, the Texas statute only attempts to articulate a residency definition and in no way contains a durational residency requirement. The Court, therefore, concludes that

the statute does not burden the constitutional right to travel and thus must be examined under the rational basis test.[2] Before analyzing whether or not the statute can pass this test, however, the Court will next consider Plaintiffs' second basic point of attack.

Plaintiffs contend that the statute violates both the due process and equal protection clauses of the fourteenth amendment because its definition of residency creates "an invalid irrebuttable presumption of non-residency."[3] This contention is essentially grounded on two key cases, *Carrington* v. *Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) and *Vlandis* v. *Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). In *Carrington*, the Court was concerned with the provision of the Texas Constitution that prohibited any member of the armed

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[2] Even if a durational residency requirement were involved in this case, it would not automatically be considered an unconstitutional penalty on the right to interstate travel. In *Shapiro*, *supra*, the Court expressly reserved decision as to whether a durational residency requirement for "tuition-free education" would be unconstitutional. 394 U.S. at 638 fn.21, 89 S.Ct. at 1333, f. 21, 22 L.Ed.2d at 617. In *Memorial Hospital*, *supra*, the Court reiterated that, depending upon what right is affected, some waiting periods may not be penalties. 415 U.S. at 258-59, 94 S.Ct. at 1082, 39 L.Ed.2d at 314. In *Vlandis* v. *Kline*, 412 U.S. 441, 452-53, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), the Court specifically declined to hold that a state could not impose a "reasonable durational residency requirement" as one element in demonstrating bona fide residence for purposes of lower tuition and fees. In *Starns* v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971), the district court upheld a university regulation providing that no student could qualify as a resident for tuition purposes unless he had been a bona fide domiciliary of the State for at least one year, and this decision was affirmed by the Supreme Court. In *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), the Court upheld a one-year durational residency requirement for obtaining a divorce.

[3] Plaintiffs' First Amended Complaint, 2lb.

forces of the United States who moved his home to Texas during the course of his military duty from ever voting in a Texas election "so long as he or she is a member of the Armed Forces." The Court held that this provision violated the equal protection clause of the fourteenth amendment. In that case, however, it was undisputed that the petitioner had been domiciled in Texas and that "he intend[ed] to make his home there permanently." 380 U.S. at 91, 85 S.Ct. at 777, 13 L.Ed.2d at 677. The Court stressed that Texas had the right to require all military persons to be bona fide residents of the community before they were entitled to vote but concluded that if the military personnel were "in fact residents, with the intention of making Texas their home indefinitely," then they had the right to be treated the same as other Texas residents. *Id.* at 93-94, 85 S.Ct. at 779, 13 L.Ed.2d at 678.

In *Vlandis*, the Court considered a Connecticut statute which attempted to define residents and non-residents for purpose of paying higher tuition at state universities. Under the statutory scheme, once a student was classified as a "non-resident," his status was permanent and irrebuttable during the entire time that he remained at the university, regardless of the particular fact situation of any given student. The Court held that this statute was a violation of the constitutional right to due process. In so doing, however, the Court was careful to observe that it was not questioning the segregation of students into resident and non-resident categories nor the charging of higher fees to the latter group. The narrow holdings in *Vlandis*, therefore, was simply that a permanent irrebuttable presumption of non-residence violated the due process clause.

The Court cannot agree that the statute involved here creates an irrebuttable presumption of the type condemned by *Vlandis*. The challenged portion of the statute provides, in essence, that if a student under the age of eighteen years is living apart from his parent, guardian, or other person having lawful control of him under court order, then in order to establish residency for purposes of attending free public schools, that student must establish that his presence in the school

district is "not for the primary purpose of attending the public free schools." Thus, unlike statutes which set forth objective criteria for residency such as length of time or a negative category (such as "member of the Armed Forces"), this statute codifies the ultimate universal test of residency, namely subjective intent. Of course, there is a certain superficial logic to the argument that the statutory definition is "irrebuttable" because as long as the minor student admits that he is living apart from his parent or guardian for the sole purpose of attending free public schools in a particular district, then he can never be classified as a resident. On the other hand, however, by using the definition of residency almost universally accepted in school cases, the statutory criteria in one sense merely states a truism, namely that a person who only intends to remain in a given place temporarily in order to take advantage of a particular benefit at that location necessarily lacks the permanence to be classified as a resident.

Thus, in *Vlandis*, *supra*, the Supreme Court said:

> The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, *but who have come there solely for educational purposes*, cannot take advantage of the in-state rates. 412 U.S. at 453-54, 93 S.Ct. at 2237 (emphasis supplied).

In *Spriggs* v. *Altheimer, Arkansas School District Number Twenty-Two*, 385 F.2d 254 (8th Cir. 1967), the minor school children had been charged tuition because they were living with their grandfather rather than with their mother who lived in another school district. The Eighth Circuit remanded the case to the district court to make a factual determination as to the residency of the children for purposes of the Arkansas statute, which provided free public schools to all persons "residing" in the district. The trial court was instructed to hear further evidence on the question but the following guideline was given:

> On the other hand, if the residency of the children with their grandfather is only temporary for the primary pur-

> pose of attending school in a district other than where their parents reside, then tuition under the statutes would be proper. 385 F.2d at 259.

In *Clarke* v. *Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966) (three judge court), regulations classifying residents and non-residents for tuition purposes at the State University of Iowa were upheld as being constitutionally valid on their face. Among other things, these regulations defined a bona fide resident to mean a student who is "not in the state primarily to attend a college". 259 F. Supp. at 121. In *Kelm* v. *Carson*, 473 F.2d 1267 (6th Cir. 1973), the Court noted that where a statute and regulation "seek to distinguish between temporary sojourners in Ohio who reside there only for school purposes and Ohio residents, the intention of the party and what he has done to evidence that intent becomes critical." *Id.* at 1271. Presence in a school district for the primary purpose of attending school was also held insufficient "residency" for tuition purposes in *Mansfield Township Board of Education* v. *State Board of Education*, 101 N.J.L. 474, 129 A. 765 (Sup.Ct. 1925) and *Mt. Hope School Dist.* v. *Hendrickson*, 197 Iowa 191, 197 N.W. 47 (1924).

In the instant case, Plaintiffs attack the statute only on its face but it is interesting to note that at least as applied within the Defendant school districts, the statute can hardly be called irrebuttable in actual practice. Indeed, the stipulated evidence clearly shows that between approximately August 1, 1977, and May 25, 1978, the McAllen Independent School District had only 56 applications from students who were United States citizens and covered by § 21.031(d) and, of that number, all but five were enrolled in school. *See* Finding of Fact No. 38. The evidence indicated that students living apart from their parent or guardian because of physical health or emotional well-being, broken homes, health reasons, etc., are all allowed to qualify for free public schools. Thus, if the statute in question contains even an indirect presumption of non-residency, certainly the presumption is rebuttable in practice. *See Michelson* v. *Cox*, 476 F. Supp. 1315 (S.D. Iowa 1979). Even if a child were to

originally move into the school district for the primary purpose of attending school, there is nothing on the face of the statute nor apparently in actual practice, to prohibit the child from being reclassified as a resident if in fact his circumstances—specifically his primary motive for being in the district—would change from one school semester to another. In summary, therefore, the only students to whom the statutory definition of non-residency is in any sense irrebuttable are those students who persist in declaring that their primary purpose for being present in the school district is to attend the public free schools. Because such a declaration would ipso facto place the student within the classic legal definition of a non-resident, the Court concludes that it does no violence to the Constitution.

Plaintiffs further suggest, however, that the statute is discriminatory because only category of students must defend its motives. In other words, a literal reading of Section 21.031(d), reflects that if a student under the age of eighteen years is living with his parents, legal guardian, or some person having lawful control of him under court order, then that student's purpose for being in the school district is unquestioned. It is only when a person under the age of eighteen years is living apart from a parent or guardian or other person having lawful control that he must establish the proper motive for being in the district. In resolving this contention, it is again necessary to recall the Court's earlier conclusion that this statute must only pass the rational basis test.

As stated in *Dandridge* v. *Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970):

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 37 S.Ct. [337], 340, 55

> L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theater Co* v. *City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. [441], 443, 57 L.Ed. 730. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U.S. 420, 426, 81 S.Ct. [1101], 1105, 6 L.Ed.2d 393.

397 U.S. at 485, 90 S.Ct. at 1161, 6 L.Ed.2d at 433.

The Court concludes that in the present statutory scheme, there is some reasonable basis for separately classifying minor school children living apart from their parents, guardian or other person having custody under court order. Section 21.031(d) attempts to define "residence" for this one class of students. The word "residence" has many meanings in the law, largely determined by the statutory context in which it is used. *Kelm* v. *Carlson*, 473 F.2d 1267, 1271 (6th Cir. 1973). Within the context of § 21.031(d), residence means something more than mere physical presence and thus is more closely related to the concept of domicile. *See DeLeon* v. *Harlingen Consolidated Independent School District*, 552 S.W.2d 922, 924 (Tex.Civ.App.—Corpus Christi 1977, no writ). The cases discussing the domicile of a minor are, therefore, extremely helpful in evaluating the reasonableness of this legislative classification. Under Texas common law, a minor is "not sui juris, and can neither select nor change its domicile, which is fixed by law as that of his father." *Smith* v. *Ausley*, 257 S.W.2d 156, 157 (Tex.Civ.App.—Waco 1953, writ ref'd n.r.e.); *see Bradshaw* v. *Peacock*, 145 Tex. 68, 194 S.W.2d 551, 554 (1946); *Mills* v. *Howard*, 228 S.W.2d 906, 907 (Tex.Civ.App.—Amarillo 1950, no writ); *see generally* Restatement of Conflicts of Law § 11 (1934). This notion rests in large measure upon the minor's presumed lack of capacity to form the requisite intention necessary to establish a separate domicile. *Deterly* v. *Wells*, 53 S.W.2d 847, 848 (Tex.Civ.App.—Dallas, 1932, writ refused). Indeed, the common law presumption is so strong that even when a child is abandoned by both parents, he still cannot acquire his own domicile. *See generally* Restatement of

Conflicts of Law § 34 (1934) (where a child is abandoned by both parents it takes its father's domicile at the time of the abandonment). Since the child's ability in Texas to acquire his own separate residence is a matter of legislative grace,[4] it is certainly not unreasonable to require that his presence in another school district be for some cogent reason other than attending free public school in that district before qualifying for tuition-free status. *See DeLeon* v. *Harlingen Consolidated Independent School District*, *supra*, at 924.

Having concluded that Section 21.031(d) does not create an invalid irrebuttable presumption against residency and having further concluded that there is some rational basis for defining the residency of minors living apart from a parent or guardian or other person in lawful control under court order, the only remaining question would be whether there is a rational basis for the statutory definition of residency. Actually, Plaintiffs do not seriously challenge this aspect of the statute. A state has a legitimate interest in protecting and preserving the quality of its educational system and the right of its own bona fide residents to attend state schools on a preferred tuition basis. *Vlandis* v. *Kline*, *supra*, at 452-53, 93 S.Ct. 2236. Similarly, the state would have an interest in preserving the financial

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[4] In the relatively new Texas Family Code, the Texas Legislature both codified and modified the common law in certain respects. For example, like the common law, a child's domicile is expressly defined as that of his parent. Texas Fam.Code Ann. § 12.04 (Vernon Supp. 1978). Likewise, if a managing conservator is appointed, his domicile establishes that of the child. *Id.* § 14.02. On the other hand, for venue purposes, while a child is deemed to reside with its parents, guardian, manager conservator or other in lawful control, if it is found that the child is not under the care and control of any adult, then he resides where he is found. *Id.* § 11.04(c)(6). Thus "residence" is defined differently for venue purposes than for tuition-free purposes but these classifications are more properly left to the Legislature, and the courts will not interfere with its judgment unless the classification is patently unreasonable. *See* P. 221 *supra*.

integrity of the various components of the state educational system, *i.e.*, the individual school districts. *East Texas Guidance and Achievement Center, Inc.* v. *Brockette*, 431 F. Supp. 231, 236 (E.D. Tex. 1977). It must also be remembered that although the Plaintiffs in this case have concentrated their focus on children of United States citizens residing in Mexico, nevertheless the statute on its face would also apply to children of parents living anywhere in Texas or in any of the United States. Since the statute applies to any minor student living apart from his parents, guardian or other person with lawful control, it even applies to attempted transfers between different school districts within the same county.[5] The Court is satisfied that these kinds of transfers, free of all tuition, would cause budgetary and administrative planning problems sufficient to justify the tuition scheme of the statute. As stated in *DeLeon* v. *Harlingen Consolidated Independent School District, supra:*

> The variability of student population is a serious impediment to the effective planning of virtually all phases of the educational process. There is no justification for a requirement that a school system educate in tuition-free manner those children whose only indicia of residence is mere

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[5] Since the statute is being attacked on its face, the fact that the statute facially applies to intra-state as well as inter-state movement, and indeed even to international movement, poses an additional barrier to Plaintiffs. Courts are reluctant to strike down a statute which can validly be applied to a number of situations. *Arbeitman* v. *District Court*, 522 F.2d 1031, 1034 (2d Cir. 1975). There is some question as to the existence of a constitutional right to intra-state travel and certainly as to whether infringement of such a right would have to pass the "compelling interest" test. *Wright* v. *City of Jackson*, 506 F.2d at 902; *Wardwell* v. *Board of Education*, 529 F.2d 625, 627 (6th Cir. 1976); *Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256, 1264 (D.Conn.1979). With respect to international travel, *see Califano* v. *Aznavorian*, 439 U.S. 170, 99 S.Ct. 471, 58 L.Ed.2d 435 (1978).

> presence within the district, accompanied by the student's desire (or that of his parents) to attend school therein. It is reasonable to draw the line of residency, at least for admission purposes, between those who come within a school district because they had to move into the district for some valid reason other than for educational purposes, and those who have come there for the sole purpose of getting tuition-free education within the district. There is no reason to add to the burdens of a school district by freely admitting to its schools anyone who has previously resided outside the district simply because they wanted to attend the schools in the district.

552 S.W.2d at 925.

In conclusion, the Court finds that Section 21.031(d) is a constitutional enactment of the Texas Legislature, in that it violates neither the equal protection clause nor the due process clause of the fourteenth amendment. This does not mean that the statute is perfect or that the Legislature could not have found a more precise or more equitable way to draw lines between resident and non-resident students. The Court simply concludes that the statute as drawn is not unconstitutional. Accordingly, final judgment will be entered for Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action No. B-77-296

MARIA ARREDONDO as next friend for ANDRES LOPEZ, JESUS CARRILLO as next friend for FIDEL ALVARES, MRS. ARTINO GARZA as next friend for DOLORES MICHELLE RODRIGUEZ, ORALIA MARTINEZ as next friend for DELIA and ROBERTO MORALES, FLORA FALCON as next friend for RITA GOMEZ, ANTONIO GUTIERREZ as next friend for SILVESTRE MARQUEZ LOPEZ, and VICTORIA MARTINEZ as next friend for MARTA GUTIERREZ-GONZALEZ,

Plaintiffs

v.

M. L. BROCKETTE, Commissioner of Education in his official capacity, The TEXAS EDUCATION AGENCY, PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT, MCALLEN INDEPENDENT SCHOOL DISTRICT, MISSION INDEPENDENT SCHOOL DISTRICT, HARLINGEN INDEPENDENT SCHOOL DISTRICT, and ARTURO GUERRA, RODNEY CATHEY, KENNETH WHITE, and DAN IVES, individually and in their official capacities,

Defendants

FILED
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FINAL JUDGMENT

On October 26, 1979, came on to be heard before the Court, Plaintiffs' cause of action in the above numbered case. And the Court, after having considered the pleadings and briefs of the parties, the oral argument of the attorneys, and the stipulated evidence and exhibits admitted during the hearing, is of the opinion that final judgment should be entered in favor of Defendants Pharr-San Juan-Alamo and McAllen Independent

School Districts. This judgment will in no way act as an adjudication of the rights, if any, of Plaintiffs Delia Morales, Silvestre Marquez-Lopez, Marta Gutierrez-Gonzalez, and Dolores Michelle Rodriguez since their claims have either been voluntarily dismissed or have become nonjusticiable within the present context of this action. For similar reasons, this judgment shall not act as an adjudication of the rights or liabilities, if any, of Defendants Harlingen and Mission Independent School Districts, both of which were previously dismissed as parties to this case. Accordingly, it is ORDERED that final judgment be entered in favor of the Defendants and that Plaintiffs' claim be and it is hereby DISMISSED.

DONE this 19th day of December, 1979, at Laredo, Texas.

/s/ George P. Kazen
GEORGE P. KAZEN
United States District Judge

MARIA ARREDONDO, *et al.*,
Plaintiffs-Appellants,

v.

M. L. BROCKETTE, *et al.*,
Defendants-Appellees.

No. 80-1031.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
UNIT A

June 19, 1981.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, GEWIN* and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

The sole issue in this case is the constitutionality *vel non* of Tex.Educ.Code Ann. tit. 2, § 21.031(d) (Vernon Supp. 1978), which provides:

> In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is *not for the primary purpose of attending the public free schools.* The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools. (Emphasis added.)

Appellants are United States citizens between five and eighteen years of age, not living with their parents or legal guardians, who have chosen to live in a school district for the

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* Due to his death on May 15, 1981, Judge Gewin did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

primary purpose of attending its free public schools. They were denied tuition-free admission to the public schools because of the strictures of the challenged statute. The district court, 482 F. Supp. 212, upheld the statute. We affirm.

The original complaint was filed as a class action, but this aspect was eliminated by an amended complaint. Only two of the original plaintiffs remain, Robert Morales and Rita Gomez.[1] It is contended that § 21.031(d) of the Texas Education Code violates the due process and equal protection clauses of the fourteenth amendment of the Constitution.

Appellants argue that the challenged statute, as applied, results in invidious discrimination against Mexican-Americans, violating their right to equal protection. The Supreme Court has found classifications based on race or alienage inherently suspect and subject to close judicial scrutiny. *Graham* v. *Richardson*, 403 U.S. 365, 371-72, 91 S.Ct. 1848, 1851-1852, 29 L.Ed.2d 534 (1971). Were this statute to be so classified, it would be subjected to strict judicial scrutiny and would not be upheld unless a compelling state interest were shown. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). We do not address this question because discriminatory application is not alleged in the amended complaint. The issue may not be revived on appeal.

Appellants assert a second ground for application of the compelling interest test—the statute improperly burdens the fundamental right of interstate travel. Strict judicial scrutiny is also appropriate in those situations in which a constitutionally protected right is infringed. *San Antonio School District* v. *Rodriguez*, 411 U.S. at 40, 93 S.Ct. at 1300. Although not explicitly mentioned in the Constitution, the right to interstate travel has been repeatedly recognized as a basic right, fundamental to the concept of our federal union. *United States* v. *Guest*, 383 U.S. 745, 757-58, 86 S.Ct. 1170, 1177-1178, 16

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[1] The other plaintiffs are no longer parties to the litigation for various reasons, they withdrew from the school district, were subsequently admitted into the public schools, or presented no evidence in support of their claim.

L.Ed.2d 239 (1966). We recognize that in the statutory definition of residency in § 21.031(d) denies tuition-free admission to public school to those whose presence in the school district is primarily for that purpose. All residency requirements, however, are not unconstitutional. The Supreme Court has distinguished between residency requirements and *durational* residency requirements, finding only the latter violative of the right to travel. *See McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed.2d 366 (1976). Based on this distinction, the district court declined to apply the strict scrutiny standard, requiring instead that the statute be supported by minimum rationality and, on that basis, found the statute constitutional.

We agree in principle with the district court's analysis of the right to interstate travel. Nevertheless, we defer the determination whether the strict scrutiny or rational basis yardstick should be applied for under either measure Texas' interests in enacting the statute are sufficient. We need not decide whether in another instance involving a similar statute a legitimate state interest alone would suffice. We are in accord with the district court's articulation of the state's interests, expressed as follows:

"A state has a legitimate interest in protecting and preserving the quality of its educational system and the right of its own bona fide residents to attend state schools on a preferred tuition basis. *Vlandis* v. *Kline*, [412 U.S. 441, 452-53, 93 S.Ct. 2230, 2236-2237, 37 L.Ed.2d 63 (1973)]. Similarly, the state would have an interest in preserving the financial integrity of the various components of the state educational system, *i.e.*, the individual school districts. *East Texas Guidance and Achievement Center, Inc.* v. *Brockette*, 431 F. Supp. 231, 236 (E.D.Tex.1977). . . . [T]he statute on its face [applies] to children of parents living anywhere in Texas or in any of the United States. Since the statute applies to any minor student living apart from his parents, guardian or other person with lawful control, it even applies to attempted transfers between different school districts within the same county. The Court is satisfied that these kinds of transfers, free of all tuition, would

cause budgetary and administrative planning problems sufficient to justify the tuition scheme of the statute. As stated in *DeLeon* v. *Harlingen Consolidated Independent School District*, [552 S.W.2d 922 (Tex.Civ.App.—Corpus Christi 1977, no writ)]:

> 'The variability of student population is a serious impediment to the effective planning of virtually all phases of the educational process. There is no justification for a requirement that a school system educate in tuition-free manner those children whose only indicia of residence is mere presence within the district, accompanied by the student's desire (or that of his parents) to attend school therein. It is reasonable to draw the line of residency, at least for school admission purposes, between those who come within a school district because they had to move into the district for some valid reason other than for educational purposes, and those who have come there for the sole purpose of getting tuition-free education within the district. There is no reason to add to the burdens of a school district by freely admitting to its schools anyone who has previously resided outside the district simply because they wanted to attend the schools in the district.' 552 S.W.2d at 925."
> [Footnotes omitted.]

Appellants argue that regardless of the level of judicial scrutiny, the statute at issue creates an irrebuttable presumption of non-residency and, therefore, violates the due process clause of the fourth amendment. Section 21.031(d) allows a person under 18 to establish a residence separate from his parents or legal guardian, for the purpose of attending school in the district in which his separate residence is located, but only if the minor's residence is not established in that school district for the primary purpose of attending its free public school. Appellants insist that through its definition of residency the statute establishes an irrebuttable presumption that a person living in a school district for the primary purpose of attending its school is a non-resident. We are impressed by the well-reasoned and thorough analysis and discussion of the district judge and adopt his response to this contention as our own:

"This contention is essentially grounded on two key cases, *Carrington* v. *Rash*, 380 U.S. 89 [85 S.Ct. 775, 13 L.Ed.2d 675]

(1965) and *Vlandis* v. *Kline*, 412 U.S. 441 [93 S.Ct. 2230, 37 L.Ed.2d 63] (1973). In *Carrington*, the court was concerned with the provision of the Texas Constitution that prohibited any member of the armed forces of the United States who moved his home to Texas during the course of his military duty from ever voting in a Texas election so long as he or she is a member of the Armed Forces. The Court held that this provision violated the equal protection clause of the Fourteenth Amendment. In that case, however, it was undisputed that the petitioner had been domiciled in Texas and that he 'intend[ed] to make his home there permanently.' 380 U.S. at 91 [85 S.Ct. at 777]. The Court stressed that Texas had the right to require all military persons to be bona fide residents of the community before they were entitled to vote but concluded that if the military personnel were 'in fact residents, with the intention of making Texas their home indefinitely,' then they had the right to be treated the same as other Texas residents. *Id.* at 93-94 [85 S.Ct. at 778-779].

"In *Vlandis*, the Court considered a Connecticut statute which attempted to define residents and non-residents for purpose of paying higher tuition at state universities. Under the statutory scheme, once a student was classified as a 'non-resident,' his status was permanent and irrebuttable during the entire time that he remained at the university, regardless of the particular fact situation of any given student. The Court held that this statute was a violation of the constitutional right to due process. In so doing, however, the Court was careful to observe that it was not questioning the segregation of students into resident and non-resident categories nor the charging of higher fees to the latter group. The narrow holding in *Vlandis*, therefore, was simply that a permanent irrebuttable presumption of non-residence violated the due process clause.

"The Court cannot agree that the statute involved here creates an irrebuttable presumption of the type condemned by *Vlandis*. The challenged portion of the statute provides, in essence, that if a student under the age of eighteen years is living apart from his parent, guardian, or other person having

lawful control of him under court order, then in order to establish residency for purposes of attending free public schools, that student must establish that his presence in the school district is 'not for the primary purpose of attending the public free schools.' Thus, unlike statutes which set forth objective criteria for residency such as length of time or a negative category (such as 'member of the Armed Forces'), this statute codifies the ultimate universal test of residency, namely subjective intent. Of course, there is a certain superficial logic to the argument that the statutory definition is 'irrebuttable' because as long as the minor student admits that he is living apart from his parent or guardian for the sole purpose of attending free public schools in a particular district, then he can never be classified as a resident. On the other hand, however, by using the definition of residency almost universally accepted in school cases, the statutory criteria in one sense merely states a truism, namely that a person who only intends to remain in a given place temporarily in order to take advantage of a particular benefit at that location necessarily lacks the permanence to be classified as a resident.

> "Thus, in *Vlandis*, *supra*, the Supreme Court said:
>
> 'The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, *but who have come there solely for educational purposes*, cannot take advantage of the in-state rates.' 412 U.S. at 453-4 [93 S.Ct. at 2237] (emphasis supplied).

In *Spriggs* v. *Altheimer, Arkansas School District Number Twenty-Two*, 385 F.2d 254 (8th Cir. 1967), the minor school children had been charged tuition because they were living with their grandfather rather than with their mother who lived in another school district. The Eighth Circuit remanded the case to the district court to make a factual determination as to the residency of the children for purposes of the Arkansas statute which provided free public schools to all persons 'residing' in the district. The trial court was instructed to hear

further evidence on the question but the following guideline was given:

> 'On the other hand, if the residency of the children with their grandfather is only temporary for the primary purpose of attending school in a district other than where their parents reside, then tuition under the statutes would be proper.' 385 F.2d at 259.

In *Clarke* v. *Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966) (three judge court), regulations classifying residents and non-residents for tuition purposes at the State University of Iowa were upheld as being constitutionally valid on their face. Among other things, these regulations defined a bona fide resident to mean a student who is 'not in the state primarily to attend a college.' 259 F. Supp. at 121. In *Kelm* v. *Carlson*, 473 F.2d 1267 (6th Cir. 1973), the Court noted that where a statute and regulation 'seek to distinguish between temporary sojourners in Ohio who reside there only for school purposes and Ohio residents, the intention of the party and what he has done to evidence that intent becomes critical.' *Id.*, at 1271. Presence in a school district for the primary purpose of attending school was also held insufficient 'residency' for tuition purposes in *Mansfield Township Board of Education* v. *State Board of Education* [101 N.J.L. 474], 129 A. 765 (N.J. Sup.Ct. 1925) and *Mt. Hope School Dist.* v. *Hendrickson* [197 Iowa 191], 197 N.W. 47 (Iowa Sup. Ct. 1924).

"In the instant case, Plaintiffs attack the statute only on its face but it is interesting to note that at least as applied within the Defendant school districts, the statute can hardly be called irrebuttable in actual practice. Indeed, the stipulated evidence clearly shows that between approximately August 1, 1977, and May 25, 1978, the McAllen Independent School District had only 56 applications from students who were United States citizens and covered by § 21.031(d) and, of that number, all but five were enrolled in school. *See* Finding of Fact No. 38. The evidence indicated that students living apart from their parent or guardian because of physical health or emotional well-being, broken homes, health reasons, etc., are all allowed to qualify

for free public schools. Thus, if the statute in question contains even an indirect presumption of non-residency, certainly the presumption is rebuttable in practice. *See Michelson* v. *Cox*, 476 F.Supp. 1315 (S.D. Iowa 1979). Even if a child were to originally move into the school district for the primary purpose of attending school, there is nothing on the face of the statute nor apparently in actual practice, to prohibit the child from being reclassified as a resident if in fact his circumstances—specifically his primary motive for being in the district—would change from one school semester to another. In summary, therefore, the only students to whom the statutory definition of non-residency is in any sense irrebuttable are those students who persist in declaring that their primary purpose for being present in the school district is to attend the public free schools. Because such a declaration would ipso facto place the student within the classic legal definition of a non-resident, the Court concludes that it does no violence to the Constitution.

"Plaintiffs further suggest, however, that the statute is discriminatory because only one category of students must defend its motives. In other words, a literal reading of Section 21.031(d), reflects that if a student under the age of eighteen years is living with his parents, legal guardian, or some person having lawful control of him under court order, then that student's purpose for being in the school district is unquestioned. It is only when a person under the age of eighteen years is living apart from a parent or guardian or other person having lawful control that he must establish the proper motive for being in the district. In resolving this contention, it is again necessary to recall the Court's earlier conclusion that this statute must only pass the rational basis test.

"As stated in *Dandridge* v. *Williams*, 397 U.S. 471 [90 S.Ct. 1153, 25 L.Ed.2d 491] (1970):

> 'In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification

> "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S.Ct. 337, 340, 55 L.Ed. 369]. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 [33 S.Ct. 441, 443, 57 L.Ed. 730]. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 [81 S.Ct. 1101, 1105, 6 L.Ed.2d 393].' 397 U.S. at 485 [90 S.Ct. at 1161].

The Court concludes that in the present statutory scheme, there is some reasonable basis for separately classifying minor school children living apart from their parents, guardian or other person having custody under court order. Section 21.031(d) attempts to define 'residence' for this one class of students. The word 'residence' has many meanings in the law, largely determined by the statutory context in which it is used. *Kelm* v. *Carlson*, 473 F.2d 1267, 1271 (6th Cir. 1973). Within the context of § 21.031(d), residence means something more than mere physical presence and thus is more closely related to the concept of domicile. *See DeLeon* v. *Harlingen Consolidated Independent School District*, 552 S.W.2d 922, 924 (Tex.Civ.App.—Corpus Christi 1977, no writ). The cases discussing the domicile of a minor are, therefore, extremely helpful in evaluating the reasonableness of this legislative classification. Under Texas common law, a minor is 'not sui juris, and can neither select nor change its domicile, which is fixed by law as that of its father.' *Smith* v. *Ausley*, 257 S.W.2d 156, 157 (Tex.Civ.App.—Waco 1953, writ ref'd n.r.e.); *see Bradshaw* v. *Peacock* [145 Tex. 68], 194 S.W.2d 551, 554 (Tex.Sup.Ct. 1946); *Mills* v. *Howard*, 228 S.W.2d 906, 907 (Tex.Civ.App.—Amarillo 1950, no writ); *see generally*, Restatement of Conflicts of Law § 11 (1934). This notion rests in large measure upon the minor's presumed lack of capacity to form the requisite intention necessary to establish a separate domicile. *Deterly* v. *Wells*, 53 S.W.2d 847, 848 (Tex.Civ.App.—Dallas 1932, writ ref'd). Indeed, the common

law presumption is so strong that even when a child is abandoned by both parents, he still cannot acquire his own domicile. *See generally* Restatement of Conflicts of Law § 34 (1934) (where a child is abandoned by both parents it takes its father's domicile at the time of the abandonment). Since the child's ability in Texas to acquire his own separate residence is a matter of legislative grace, it is certainly not unreasonable to require that his presence in another school district be for some cogent reason other than attending free public school in that district before qualifying for tuition-free status. *See DeLeon* v. *Harlingen Consolidated Independent School District*, *supra*, at 924." [Footnotes omitted.]

We hold that § 21.031(d) is a constitutional enactment of the Texas state legislature. The decision of the district court is

AFFIRMED.

PLAINTIFF'S EXHIBIT 10/26/79 1 ____ B-77-296

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C. A. No. B-77-296

STIPULATION CONCERNING PLAINTIFFS' TESTIMONY

OCT 26 1979

It is hereby stipulated by and between Plaintiffs and Defendants Brockette, Texas Education Agency, McAllen and Pharr-San Juan-Alamo Independent School Districts that were Plaintiffs ROBERTO MORALES and RITA GOMEZ under oath they would testify as follows:

1. That each is a school age child over 5 years of age and under 18 years of age;

2. That each is a citizen of the United States;

3. That ROBERTO MORALES lives within the McAllen Independent School District for the purpose of attending school and learning english;

4. That RITA GOMEZ lives within the Pharr-San Juan-Alamo School District for the purpose of attending school;

5. That none of them live with his or her parents or legal guardian or person having lawful control of him under an order of court;

6. That none of them has a parent, legal guardian, or other person having lawful control of them under an order of court living within the McAllen or Pharr-San Juan-Alamo School Districts;

7. That each of them lives with an adult sister who lives in the same school district as each Plaintiff;

8. That ROBERTO MORALES began living in the McAllen Independent School District at the beginning of the 1977 school year and has continued to live in McAllen since that time.

9. That ROBERTO MORALES takes part in the customary life activities associated with being a part of the household of the adult with whom he lives, and he intends to continue to live in the McAllen Independent School District until he completes his education;

10. That while living in the McAllen Independent School District and attending school he has traveled to points outside of McAllen Independent School District for the purpose of visiting friends, relatives, and his parents during the customary holidays granted students in the McAllen Independent School District.

11. That ROBERTO MORALES was denied admission to McAllen Independent School District in 1977 and in 1978. In November, 1978, he was granted permission to attend school in the McAllen Independent School District provided that there is space available and provided that he paid tuition.

12. That in November, 1978, tuition in the amount of $378.00 was paid on behalf of ROBERTO MORALES by Texas Rural Legal Aid, Inc.

13. That ROBERTO MORALES now owes and has not paid tuition for Spring 1978 and Fall 1979.

14. That ROBERTO MORALES has been informed that at the present time his continued enrollment is conditioned upon the immediate payment of the tuition due and the availability of space for him.

15. That RITA GOMEZ takes part in all of the customary life activities associated with being a part of the household of the adult with whom she lives, and she intends to continue to live in Pharr-San Juan-Alamo School District until she completes her education.

16. That at the beginning of the 1979-1980 school year RITA GOMEZ applied for tuition free admission to the schools of the district where each lives with some adult;

17. That RITA GOMEZ was denied free admission to school by an official or employee of the Pharr-San Juan-Alamo School District.

18. The basis for the denial of free admission to the public schools was Texas Education Code § 21.031(c) and (d) for the reason that RITA GOMEZ and ROBERTO MORALES are living in the school districts for the purpose of attending school and are living apart from their parents, guardians or other persons having lawful control of them under an order of court.

19. That RITA GOMEZ was later admitted to the Pharr-San Juan-Alamo School District on the basis of a promise that she would comply with Texas Education Code § 21.031(c) and (d).

20. That none of the adults with whom these children reside desire to become the legal guardian or legal custodian of the child who lives with him;

21. That these children and the adults with whom they live are indigent.

IT IS STIPULATED AND AGREED that this testimony will be admissable in evidence at trial herein, saving any and all evidentiary objections to 21 above.

Signed and Stipulated on behalf of the Defendants here in on this ____ day of October, 1979.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN FAINTER
First Assistant

DOUGLAS B. OWEN
Assistant Attorney General

GREG WILSON
Assistant Attorney General

NEAL KING
Attorney for Mission
Independent School District

MARIO E. RAMIREZ
Attorney for Pharr-San Juan-Alamo
Independent School District

/s/ Travis Hiester
TRAVIS HIESTER
Attorney for McAllen Independent
School District

TEXAS RURAL LEGAL AID, INC.

/s/ Edward J. Tuddenham
EDWARD J. TUDDENHAM

Attorneys for Plaintiffs

PLAINTIFFS' EXHIBIT 2

February 28, 1978

Mr. and Mrs. Felipe Martinez
1717 Newport
McAllen, Texas 78501

Dear Mr. and Mrs. Martinez:

By action of the Board of Trustees of the McAllen Independent School District on February 27, 1978, Roberto and Dalia Morales have been refused admission to enter school.

It was the determination of the Board that Roberto and Dalia were residing in McAllen for the primary purpose of attending school. According to V.T.C.A. Education Code, Section 21.031(c) and (3), the Board of Trustees shall be responsible for determining whether an applicant for admission is a resident for purposes of attending the public schools.

Sincerely yours,

Rodney D. Cathey
RDC:bv
Cc: Texas Rural Legal Aid
Edinburg, Texas

PLAINTIFF'S EXHIBIT 10/26/79 1 ____ B-77-296

EDUCATION COMMITTEE MEETING
HEARING ON HB 247 (SB 425)
MARCH 25, 1977

Transcribed by
Texas Senate Staff Services
February 28, 1978

Filed OCT 26 1979

I, Betty King, Secretary of the Texas Senate and Custodian of the Senate records, certify that this copy of the transcribed Education Committee meeting, hearing on HB 247 (SB 425), dated March 25, 1977, is a true copy of the official record on file in my office and in my custody.

/s/ Betty King
BETTY KING
Secretary of the Texas Senate

SUBSCRIBED AND SWORN to by the said Betty King, this the 1st day of March, 1978, to certify which witness my hand and seal of office.

/s/ Peggy B. Brinkman
PEGGY B. BRINKMAN
Notary Public in and for
Travis County, Texas

EDUCATION COMMITTEE MEETING
HEARING ON HB 247 (SB425)
MAY 25, 1977

SENATOR SNELSON IN THE CHAIR
SENATOR LONGORIA PRESENTING BILL

SENATOR SNELSON: The Chair is now going to lay out House Bill 247, and recognize Senator Longoria.

SENATOR LONGORIA: Mr. Chairman and members of the Committee, Senate Bill 247 merely provides a—a method by which it migh be more restrictive the way that somebody was qualified to go into the schools of the state.

At the present time we're having a very difficult time—and along the border where the way the law is now, ah, anybody can qualify to go to school, and this bill merely makes it harder for them to—they have to establish that they moved into the district, not only for the purpose of attending school, but for other purposes as well, before they can be allowed to attend the schools.

It's a very good bill, and I think it is necessary, particularly for the border areas where the school districts are having such a difficult time with the—

SEN. SNELSON: Is this—(inaudible, voices overlapping)—restrictions—?

SEN. LONGORIA: —school—

SEN. SNELSON: —you say, on how they establish residence?

SEN. LONGORIA: Yes, sir. It will—it will (time?) the restrictions, ah, to make it more difficult for kids to be brought in from Mexico to attend schools in the United States.

SEN. SNELSON: Okay, fine. Any other person desiring to testify in behalf of, or in opposition to House Bill 247? If not, thank you very much, Sen. Longoria.

SEN. LONGORIA: Thank you, Senator.

COMMITTEE RECESSES

SENATOR MAUZY, CHAIRMAN, IN THE CHAIR: Senator Aikin moves that House Bill 247 be reported back for recommendation it do pass and be printed. Is there objection? The Chair hears none—members present will be recorded voting aye.

(meeting continues with chair taking up other bills)

PLAINTIFF'S EXHIBIT
10/26/79
B-77-296

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CIVIL ACTION NO: 77-B-296

MARIA ARREDONDO, *et al.*,

Plaintiffs,

v.

M. L. BROCKETTE, *et al.*,

Defendants

Filed OCT 26 1979

SUMMARY OF MCALLEN SCHOOL REPORTS

TOTAL CHILDREN APPLYING	938
TOTAL U.S. CITIZEN CHILDREN	538
TOTAL U.S. CITIZENS LIVING APART FROM THEIR PARENTS, GUARDIAN, OR PERSON WITH CONTROL UNDER COURT ORDER	56
TOTAL CHILDREN LIVING APART FROM PARENTS ETC.-ADMITTED	51
TOTAL CHILDREN LIVING APART FROM PARENTS ETC.-NOT ADMITTED	5

RESIDENCE OF PARENTS OF FIVE (5) REJECTED CHILDREN

1. Reynosa Mexico
2. Palacios, Texas (2 children)
3. Moore, Oklahoma

4. Unknown town in Mexico

This Summary is based upon a count of the reports of applications to McAllen Independent School District ordered to be filed with the Court and with copies to counsel for Plaintiffs by Judge Garza in February, 1978

DEFENDANT'S EXHIBIT
B-77-296
NO. 1 10/26/79

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CIVIL ACTION NO. B-77-206

MARIA ARREDONDO, et al.,

Plaintiffs,

VS

M. L. BROCKETTE, et al.,

Defendants.

October 26, 1979

STIPULATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs and Defendants in the above styled and numbered cause, except HARLINGEN CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, and announce to the Court that they have agreed and stipulated that RODNEY D. CATHEY, Superintendent of the McALLEN INDEPENDENT SCHOOL DISTRICT; JOHN BARRON, former Superintendent of the SAN BENITO INDEPENDENT SCHOOL DISTRICT; RAUL BESTEIRO, Superintendent of the BROWNSVILLE INDEPENDENT SCHOOL DISTRICT: AUGUSTO GUERRA, Superintendent of the PHARR-SAN JUAN-ALAMO INDEPENDENT SCHOOL DISTRICT; and LLOYD D. DICKENS, Superintendent of SHELDON INDEPENDENT SCHOOL DISTRICT, Houston, Texas, are available to testify and if testifying in the above styled and numbered cause would state that based upon their own experience in school districts throughout

the State of Texas and their own independent investigation into the matters related to this cause of action as follows:

1. The Court's ruling that Section (d) of Section 21.031 of the Texas Education Code are unconstitutional would, in all reasonable probability, cause the immediate enrollment of thousands of children from other states and countries who are United States citizens, but whose parents do not reside in Texas into the Defendant School Districts.

2. The enrollment of children in this category would, in all reasonable probability, increase significantly each year in the Defendant School Districts.

3. The increased enrollment initially in future years would, in all reasonable probability, require additions of classrooms and related school facilities which would, in all reasonable probability, require the School Districts to pass bond issues for these capital improvements. In the event the bond issues did not pass and/or school facilities were not added, as required, the educational program of the School Districts would, in all reasonable probability, be adversely affected. The persons affected would be the students who now or will attend the Schools, together with their teachers and administrative personnel.

4. The additional number of students would, in all reasonable probability, require the School Districts to employ significantly more teachers and specialized teachers for bilingual and bicultural programs; to significantly expand specialized programs for bilingual and bicultrual programs, as well as purchase additional books, equipment, supplies and customary items of support. The increase in funds used to operate districts in this regard would, in all reasonable probability, require a significant increase in the budget of the School Districts which is funded both by state contributions to the School Districts and local taxation. Some school districts are presently at the maximum tax rate permitted by law.

5. Most of the children in this category do not pay any local school or state taxes or tuition and, therefore, their education would be funded and paid for by resident taxpayers of the State of Texas and the School District, including some of the adults that the children live with in the School District.

6. The increasing number and fluctuation in numbers of children coming from other states and countries into the Defendant School Districts and other school districts in the State of Texas would, in all reasonable probability, make it impossible to predict enrollment figures on an annual or semester basis even for immediate years. The enrollment may fluctuate by thousands of students, depending on many factors, such as sports programs, education opportunities, bilingual and bicultural programs, vocational training, attractive facilities, teacher-pupil ratio, maintenance of or lack of discipline and the many other factors which make one school district more inviting than another.

7. This legislative classification imposing the residency requirement applies to intrastate school district transfers as well as transfers of children from other states and countries.

8. The intrastate district transfers would cause the same problems enumerated above in paragraphs 1 through 6 and add to these same problems.

9. The intrastate transfers by children between various school districts would, in all reasonable probability, cause the school population in the Defendant School Districts to fluctuate as significantly and in all reasonable probability, more significantly than interstate transfers because of the same features set forth in paragraph 6 above. This would cause overpopulation and increase teacher-pupil ratios and crowded conditions in one school district, while at the same time, a neighboring school district may have facilities unused and teachers who are instructing only a small class of students, thereby wasting the facilities that the residents of that school district have built. Moreover it too creates a condition in which administrators of the school districts would, in all reasonable

probability, not know how to plan from year to year, or semester to semester, because of the potential influx or migration of students to and from school districts.

10. The intrastate school district transfers would, in all reasonable probability, cause problems in the sports programs, encourage recruiting of athletes—perhaps even "scholarships" would be offered to get one student athlete to transfer from one school district to another.

11. The intrastate and interstate transfers would, in all reasonable probability, have a detrimental affect on the educational standards of the Defendant School Districts and the other school districts in the State of Texas, and cause continuing changes of circumstances within the district which would detrimentally affect the students presently attending and who will attend the Defendant School Districts and the school districts throughout the State of Texas, together with the teachers and administrators employed by the said School Districts.

12. The children in this case and in the case of the alleged class live with a person who does not have legal authority over them and who cannot give permission for medical treatment, field trips, sports activities, together with other activities requiring permission.

13. The Defendant School Districts and the other school districts in the State of Texas have adopted a tax rate for 1979, assessed the taxes and sent tax statements for the 1979 taxes and have adopted budgets for the 1979-1980 school year based on the projected income from the 1979 tax revenues.

14. Neither the Texas Education Agency nor the State of Texas provides funds to assist school districts with educating children in Plaintiffs' alleged class.

It is stipulated and agreed that this testimony will be admissible in evidence at trial herein, saving any and all evidentary objections to 12 above.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN FAINTER
First Assistant

DOUGLAS B. OWEN
Assistant Attorney General

GREG WILSON
Assistant Attorney General

NEAL KING
Attorney for Mission Consolidated
Independent School District

MARIO E. RAMIREZ
Attorney for Pharr-San Juan-Alamo
Independent School District

/s/ Travis Hiester
TRAVIS HIESTER
Attorney for McAllen Independent
School District

TEXAS RURAL LEGAL AID, INC.

/s/ Edward Tuddenham
EDWARD TUDDENHAM
Attorneys for Plaintiffs

DEFENDANT'S EXHIBIT
B-77-296
NO. 2 10/26/79

COMMITTEE ON PUBLIC EDUCATION

March 8, 1977
H.B. 247

STIPULATIONS

THE STATE OF TEXAS

COUNTY OF TRAVIS

I, Julia A. Reaves, a Notary Public in and for Travis County, Texas, do hereby certify that the attached is a true and accurate transcript of the testimony on H.B. 247 heard before the House Committee on Public Education on March 8, 1977.

GIVEN under my hand and seal of office at Austin, Texas, this the 19th day of October, 1979.

/s/ Julia A. Reaves
JULIA A. REAVES, Notary Public
in and for Travis County, Texas

COMMITTEE ON PUBLIC EDUCATION
March 8, 1977

H.B. 247

CHAIRMAN: At this time, the Chair lays out H.B. 247 by Torres, and recognizes Representative Torres.

REP. TORRES: Thank you Mr. Chairman and Committee Members.

House Bill 247 is submitted at the request of superintendents from throughout the state, and also by a resolution from the State Board Association. And it is my understanding that this bill has also been endorsed by the Texas Association of School Administrators, and the Texas Association of School Secondary Principals, and the Texas Association of School Boards, and the Texas Association of Elementary Principals and Supervisors Association.

The bill relates to the residency of a student. And primarily, it complies with the opinions of the Attorney General, and simply states that if a child moves into a school district without his parents or guardian or a person having local control of the child, that that individual, or whoever has control of the child, must request permission from the school board, and the school board makes a determination whether the child is eligible to attend the free public schools in that particular school district.

I will be glad to answer any questions, Mr. Chairman, if you have any questions.

CHAIRMAN: All right, are there questions of Mr. Torres? No questions of Mr. Torres, then let us ask, is there anyone present in the chamber who wishes to testify for this measure? Yes, I do have a witness affirmation here, Mr. Torres.

REP. TORRES: I reserve the right to close, Mr. Chairman.

CHAIRMAN: Certainly. The Chair turns the chair over to Mr. Blanton.

CHAIRMAN BLANTON: Thank you, Mr. Chairman.

We have a witness affirmation from Mr. Charles F. Mathews.

Mr. Mathews, will you raise your hand? Will you swear that the testimony you are about to give this committee is the truth, the whole truth, and nothing but the truth, so help you God?

MR. MATHEWS: I do, sir.

CHAIRMAN BLANTON: All right, would you state your name and your position, and your reason for being here, sir?

MR. MATHEWS: Mr. Chairman and members of the committee. I am Charles F. Mathews, Executive Director of the Texas Association of School Administrators, and I want to affirm that our association has endorsed this bill and we support it. We have requests from various school districts from all over the state expressing a real need for this type of legislation, and this is to support the bill.

CHAIRMAN BLANTON: Are there any questions that any of the members have of Mr. Mathews? Thank you, Mr. Mathews. Do we have any other witnesses here to testify for House Bill 247? Is there anyone here to testify against House Bill 247? Then do I hear a motion? Oh, I'm sorry, Mr. Torres to close.

REP. TORRES: I had reserved the right to close in case we had some opposition, Mr. Chairman, but since we don't have any, I will accept a motion. I hope you will accept the motion.

REP. JACKSON: Mr. Chairman, I move that this bill be reported favorably to the floor with the recommendation that it do pass.

CHAIRMAN BLANTON: Mr. Jackson moves that H.B. 247 be passed to the floor and recommended that it do pass. The clerk will—just a moment.

REP. EVANS: Mr. Torres.

REP. TORRES: Yes, sir.

REP. EVANS: I wonder if you would explain why that last sentence is placed in that paragraph where it says, "And the substantive evidence rule shall apply to the determinations."

REP. TORRES: What we mean there is that this matter must be taken before the school board, and the school board will make a determination whether the child is there for the primary purpose of attending the free public schools; if he is there without his parents, guardian, or somebody with local control. Now, those people may still appeal the decision to the, say, State Board of—the State Commission of Education, to the State Board of Education, then, of course, they proceed with the judicial process. And it is up to the people to prove to the school board that the child has moved in there not for the primary purpose of attending the free public schools, but has moved in there for other purposes, a hardship case or what have you.

REP. EVANS: Could you not just take that last phrase off that I read, "and the substantive evidence rule shall apply to the determinations." And where you say, "The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for the purposes of attending the public schools," period. In other words, I don't understand why you have that last clause on there.

REP. TORRES: Well, it was explained to me, Mr. Evans, that the determination will be based on the evidence presented to the school board.

CHAIRMAN: Mr. Evans, do you have anymore questions of Mr. Torres?

REP. EVANS: I've got a problem with that. What we did, Mr. Torres, what we did in the Administrative Procedure Act, if you recall last year, we took substantive evidence rule out of all administrative procedure, totally. And I think what we are doing by adding this clause is putting it back in, period, in this specific area, and it would be very simple to add it into another one and another one because we have a precedent. The substantive evidence rule means that you are giving someone

something to hang their hat on, on any decision that is made by that board of trustees, and cannot be overruled in a court of law. That's what you are basically doing, and that substantive evidence will carry forward to the of law, and will be the evidence that is admitted, whether or not there are any witnesses that attend or not. I am afraid of that clause.

REP. TORRES: Well, at the present time, I am not in a position to . . .

REP. EVANS: Once they have made a decision, it's gone, period, no appeal.

CHAIRMAN: Any further—we have a motion on the floor to pass this H.B. 247 out for passage. Is there . . .

REP. ATKINSON: Mr. Chairman, would you accept a substitute motion?

CHAIRMAN: Yes, Mr. Atkinson.

REP. ATKINSON: I would like to move that H.B. 247 be sent to a subcommittee.

CHAIRMAN: We have an amendment to the original motion to send H.B. 247 to a subcommittee. The clerk will read the roll.

CLERK: (The clerk called the roll).

CHAIRMAN: Nine ayes and no nays, H.B. 247 is referred to a subcommittee for further study; the subcommittee to be named later by the Chairman.

The Chair now lays out H.B. 772 by Mr. Massey.

(Later in the March 8, 1977 meeting of the Committee on Public Education, H.B. 247 was again discussed).

REP. ATKINSON: Madam Chairman, will you recognize me for a motion?

CHAIRMAN DELCO: Yes, I will, Mr. Atkinson.

REP. ATKINSON: I would like to move to reconsider the vote by which H.B. 247 was sent to a subcommittee, and I would like to be heard on my motion.

CHAIRMAN DELCO: All right, Mr. Atkinson. That's H.B. 247 by Torres.

REP. ATKINSON: All right. The number one reason being the fact that some of the members had a problem with the evidentiary rule that was in the bill, and the amendment has been drafted, I think, to correct that problem, and will be offered by Mr. Evans, and that is why I asked for this to be reconsidered.

CHAIRMAN DELCO: Is there any objection to the reconsideration of the vote by which H.B. 247 was sent to subcommittee? Is there any objection? We can find that out in a hurry, Mr. Nugent. Is there anyone objecting to reconsideration of the vote on H.B. 247? The Chair sees none, so we would like to then lay out for consideration H.B. 247.

REP. ATKINSON: Madam Chairman, may I say at this time, the amendment by Mr. Evans is acceptable to the sponsor, so . . .

CHAIRMAN DELCO: Yes. Would you like to explain your amendment, Mr. Evans?

REP. EVANS: Yes. The amendment on page 1, lines 17 and 18 strikes that language that says, ". . . and the substantive evidence rule shall apply to the determinations." I hope that what I am doing by striking that language is taking the substantive evidence rule out and will allow for the board of trustees to make their determinations upon whatever evidence they so desire, not just substantive evidence or a scintilla of evidence, as I read that. And I move the adoption of the amendment.

CHAIRMAN DELCO: Is there objection to the adoption of the amendment? Then the amendment is approved.

REP. COLEMAN: Could I ask the author a question?

CHAIRMAN DELCO: Yes.

REP. COLEMAN: One reason I was kind of glad it went to a subcommittee—and I am willing to kick it out right now, too—your district and my district have many similar problems. We have many illegal aliens who are attending our public schools in our district. What is the effect of this piece of legislation in that area? Do you think you can describe that to me?

REP. TORRES: As I understand the problem, Mr. Coleman, we have in many school districts throughout the border of Texas, we have many people that are citizens of another country and cross over for the weekend and attend our public schools over here. And they are not, supposedly, bona fide residents of the school district they attend. And we have run into some problems in several cases, and the school districts are requesting some definition or to give them some power to make a determination whether that student, wherever the student may be, is a bona fide resident of the school district and whether he is entitled to attend the free public schools in Texas. Also, the bill, of course, as I said previously, it addresses—it complies with the opinions of the Attorney General that he has given out previously.

REP. COLEMAN: The sections preceding the . . . (End of Side 1 of Tape 2) (The remaining testimony on H.B. 247 cannot be transcribed as side 2 of tape 2 is blank.)

MEXICAN IMMIGRANT-ALIEN STUDENT STUDY 1975-76

JIM B. HENSLEY

THE IMPACT OF STUDENTS FROM MEXICO UPON SELECTED SCHOOL DISTRICTS IN TEXAS COUNTIES ADJACENT TO THE MEXICAN BORDER

A Research Study
by
JIM BOB HENSLEY

Submitted to: The State Board of Education and the Texas Education Agency

Funded by:
Region One Education Service Center,
Edinburg, Texas
Charles W. Benson, Executive Director

September 1976

* * *

[50] Table 6.—Grade Level of Mexican Immigrant/Alien Students Enrolled in Texas Border Districts During The 1st Quarter of 1975-76

Grade	Number of Mexican Immigrant/Aliens	Percentage
Special Education	245	.9
Ungraded	417	1.5
Kindergarten	1220	4.5
First	2292	8.5
Second	2365	8.8
Third	2348	8.7
Fourth	2409	8.9
Fifth	2403	8.9
Sixth	2387	8.9
Seventh	2299	8.5
Eighth	2321	8.6
Nineth	2477	9.2
Tenth	1570	5.8
Eleventh	1171	4.3
Twelfth	1016	3.8
Total	26,940	100.0

* * *

[80] Question five asked the superintendents to identify the types of special training or skills required of personnel who teach Mexican immigrant/alien students. Most of the superintendents indicated that the personnel should be bilingual with the skills and techniques to teach ESL and oral language development. Also, they should be able to [81] individualize their instruction and function in small group situations. An understanding of the Mexican culture and the economically deprived child was also mentioned.

Question six asked if the districts were having difficulty securing adequately trained personnel for Mexican immigrant/alien students, and to explain how this differed from securing teachers of students of their regular student body. All 22 superintendents indicated that securing certified bilingual teachers was a very difficult problem.

The difficulty of securing bilingual teachers for the lower grades was the same for Mexican immigrant/alien students as that of the regular student body. Securing ESL teachers for the upper grades who were already trained was virtually impossible. Very few, if any, ESL teachers were required for the regular students in the upper grades. Most of the recruitment of upper grade ESL teachers was to provide for the needs of the Mexican immigrant/alien students.

Question seven was related to questions five and six in that it asked the superintendent where personnel received the special trianing needed to work with the Mexican immigrant/alien students. The superintendents responded that most of the trianing was through inservice provided by the local school district or regional education service center.

* * *

[82] Table 25.—Number of Texas Border Districts Reporting Crowded Classroom Conditions During 1975-76

Type of Response	Number of Districts Responding
Schools very crowded	17
Schools slightly crowded	1
Schools not crowded	4

[83] Of the 17 districts reporting very crowded conditions, all reported that Mexican immigrant/alien students contributed to the problem. A few of these districts reported that the impact was felt mostly at the elementary level.

In response to what effect the influx of first year Mexican Immigrant/Alien students had upon the educational housing stituation, superintendents noted a variety of problems. The Brownsville superintendent indicated the problems caused by the 664 newly arrived students were practically insurmountable. The Donna and Rio Grande City school districts had to rent space from local churches to find adequate space.

Most of the other districts indicated that the influx of first year Mexican immigrant/alien students created a need for additional space by overcrowding existing classrooms. A great concern was the increased pupil-teacher ratio created by the additional students.

* * *

[91] The concern expressed most often by the superintendents of schools having high percentages of Mexican immigrant/alien students was the lack of educational facilities. They indicated that both the state and federal governments must recognize that constructing educational housing is just as

much a cost of education as providing materials and personnel. Without housing, programs and personnel are of little use.

The superintendents indicated that state or federal funding should [92] be available for construction or capital improvement purposes similar to federal military impact aid. Also, they indicated that ESEA Title I and state compensatory legislation should be amended to allow for permanent construction of educational facilities.

Throughout the interview process, a number of superintendents mentioned the inability of districts to provide additional local funds because of the lack of an adequate tax base. In order to verify these comments, a further analysis was made of a Texas Education Agency report on official compilations of market values of property mentioned earlier in this chapter.

Table 28 presents the market value of property per student in average daily attendance for the 22 school districts with high percentages of Mexican immigrant/alien students enrolled during the first quarter of the 1975-76 school year. Also, it gives the statewide rank of each of the districts listed.

Eighteen of the 22 districts were below the statewide mean and median in market value of property per ADA. Also, eleven (11) or half of the districts were among the poorest 100 districts in the state. Only four districts were ranked near the top of the 1,095 districts listed in the state.

[93] Table 28.—Market Value Per ADA of Texas Border School Districts with High Percentages of Mexican Immigrant/Alien Students*

District	Market Value Per ADA	Statewide Rank
Donna	14,529	13
Fabens	16,853	23
Socorro	18,478	28
Presidio	19,221	30
Santa Maria	20,059	32
Hidalgo	22,038	47
Brownsville	23,427	57
Progreso	23,789	59
Roma	24,970	67
San Felipe-Del Rio	25,928	73
McAllen	26,330	77
Eagle Pass	29,473	111
Tornillo	32,703	137
Canutillo	33,392	152
Rio Grande City	41,331	259
Dell City	48,168	354
La Joya	50,156	381
Monte Alto	60,892	497
Brackett	102,827	766
Clint	121,708	824
Ft. Hancock	131,988	850
Comstock	168,150	915
Statewide Median	67,641	
Statewide Mean	63,762	

*Source: Texas Education Agency Market Value Compilation, May, 1976.

[94] The final concern expressed by a number of border school superintendents invoived immigration and residency requirements. They indicated the federal government should have a better method of enforcing the immigration regulations. The documents issued an immigrant should clearly spell out the status of the individual at the time of admittance to the United States whereby there would be no doubt in the minds of school officials.

Finally, the superintendents indicated that the state law regarding residency should be more specific. It was their opinion that the child should live with their father or mother when possible, and not be able to have a relative on the United States side of the border declared guardian for the sole purpose of attending school. Also, the term, "lawful control" should be defined in the law.

SUMMARY

This chapter presented information regarding the impact large populations of Mexican imigrant/alien students have had upon border school districts. Data were gathered from the Texas Education Agency and from interviews with school superintendents.

[95] General information about the school district and community, as well as, the economic status of Mexican immigrant/alien students was included. Also, findings related to programs, personnel, and funding were presented.

The chapter ends with a summary of the opinions of the superintendents interviewed regarding the solution of the problem through new and/or amended state and federal legislation.

* * *

[100] The educational programs of the districts were affected in that the increase of large populations of Mexican immigrant/alien students produced crowded classroom conditions in most instances. The increased [101] numbers strained the financial capabilities of the districts and fewer services were provided.

The last question addressed in this study concerned the specialized staffing needs in school districts with large Mexican immigrant/alien student populations. Most districts indicated an overall teacher shortage, but especially in the areas of bilingual instruction and English as a second language. The needs in the primary grades did not differ much from that of the non-immigrant/alien student body. However, there was a severe need for personnel trained to work with the older age Mexican immigrant/alien student.

In addition to gathering information needed to address the basic research questions of this study, other pertinent findings regarding Mexican immigrant/alien students and the districts they attended were revealed. The following is a listing of the additional findings:

1. Districts closer to the border tend to have higher enrollments of Mexican immigrant/alien students.

2. Twenty-one percent of the students were less than 10 years old and 79 percent were over 10 years in age.

3. Only 48 percent of the Mexican immigrant/alien students were eligible for the State bilingual program.

4. Eighty-two percent of the immigrant/alien students participated in the free lunch program.

5. Agriculture was the industry employing the majority of the population in the 61 border school districts.

6. Mexican-Americans made up 60 percent or more of the population in the border communities.

7. [102] Superintendents interviewed felt that the percentage of immigrant/alien students was about what they expected or was more than expected. Most felt that the number had increased over the last five years and that the trend would continue.

8. The first indicator of the influx of Mexican immigrant/alien students was observed by increased educational housing needs.

9. Most immigrant/alien students lived in the low income areas of the community.

10. Most school officials thought that the economic conditions in Mexico along with the easy access to welfare programs in the United States were the main factors causing the increased migration. Also, several mentioned that immigrants were willing to work in jobs that U.S. citizens would not take.

11. Immigrant/alien students had a higher percentage of participation in the free lunch program than the regular student body indicating a lower overall economic status.

12. The most often mentioned special programs for imigrant/alien students were bilingual education, English as a second language, individual and small group tutoring, and remedial reading.

13. Special personnel were required for older age immigrant/alien students. Most districts must train the personnel because colleges and universities did not offer coursework in dealing with the older non-English speaker.

14. Most border districts had crowded classroom conditions. Many of the classrooms were not adequate for meeting the educational needs of the student population. Many districts were utilizing portable [103] facilities.

15. Many districts had constructed classrooms within the last two years with plans for more in 1976-77 to meet the increasing numbers of immigrant/alien students.

16. Educational housing was the most critical need of most of the border school districts. Secondly, program support for older age immigrant/alien students was also needed.

17. Most superintendents agreed that the cost of educating Mexican immigrant/alien students was greater than the regular student population. Funding sources mentioned most often were local taxes, state foundation, state compensatory, special education, state and federal bilingual, ESEA Title I Regular and Migrant and ESAA.

18. Most superintendents thought that the influx of Mexican immigrant/alien students had had an adverse impact on the effectiveness of state and federal funds.

CONCLUSIONS

Conclusions derived from this study were based upon information gathered from the review of related literature, analysis and interpretation of data, and as the result of the researcher's visits to school districts along the Texas/Mexico border.

1. When allocating funds to school districts for educational purposes, the state and federal governments do not recognize that constructing educational facilities for students is just as much a cost of education as providing monies for educational materials and personnel.

Because of the economic status of many of the students in border [104] school districts, compensatory funds from various sources are available to districts for programs. Very little, if any, money is available for constructing facilities to house the programs. In order to take advantage of a free lunch, bilingual,

or compensatory program, the local districts must provide funds for the space required.

2. The continual and accelerated influx of Mexican immigrant/alien students has put a burden on border school districts in terms of providing additional educational facilities to meet the needs of all students in these districts. This situation is not being experienced by the vast majority of school districts in Texas.

3. Generally, the tax base of border school districts is well below that of the rest of the state. Property owners in border districts would be taxed a greater amount than others in the state in order to provide comparable school services and facilities for their children.

Some of the districts do not participate in the federal free lunch program for poor children because they do not have the tax base to build cafeterias. In other instances, building classroom space has a higher priority than lunchrooms.

4. Due to the close proximity to Mexico, border school districts experience unique problems in the area of educational programs. Special materials and personnel are required to meet the educational needs of poor and limited English-speaking students. These are characteristics of Mexican immigrant/alien enrollees.

[105] 5. Because of the general nature of the wording in the residency laws of the state, school officials are uncertain about how to deal with some Mexican immigrant/alien students attempting to enroll in border school districts.

In addition, a dilemma exists regarding the admittance of students with questionable or incomplete credentials. While the student is securing the necessary papers to fully meet the residency requirements, state funds are not available to support the days of attendance. The alternative is to exclude the student until the process is complete, thereby causing educational problems for both the student and the school.

6. No previous studies on the impact of Mexican immigrant/alien students upon schools in the United States are available for research purposes.

RECOMMENDATIONS

Based upon the findings and conclusions of this study, the following recommendations are offered for consideration:

* * *

[107] **III. Residency Laws**

a. It is recommended that the wording regarding "residency" be more specific in order to aid school officials in determining who is eligible to attend Texas schools. Because of the close proximity to the Mexican border, many students have circumvented the present law by having a relative on the Texas side of the border declared their guardian. This entitles them to access to Texas public schools even though both parents are living, but residing in Mexico.

b. Because school districts are not eligible for state funds for students who do not have proper residency papers, it is recommended that the law be amended to permit funding while the student is in the process.

Opposition

FILED
DEC 9 1981
CLERK

No. 81-857

In the Supreme Court of the United States

October Term, 1981

ORALIA MARTINEZ, as next friend of ROBERTO MORALES, *Petitioners*,

vs.

DR. M. L. BROCKETTE, as TEXAS COMMISSIONER OF EDUCATION; The TEXAS EDUCATION AGENCY; McALLEN INDEPENDENT SCHOOL DISTRICT; and RODNEY CATHEY, as Superintendent of McAllen Independent School District, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

TRAVIS HIESTER
(Counsel of Record)
ATLAS & HALL
P. O. Drawer 3725
McAllen, Texas 78501
(512) 682-5501
Attorneys for Respondents, Rodney Cathey and McAllen Independent School District

MARK WHITE
Attorney General of Texas
RICHARD ARNETT
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131
Attorneys for Respondents, Dr. M. L. Brockette and The Texas Education Agency

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

Petitioners state the Questions for Review.

LIST OF PARTIES

Petitioners have erroneously omitted a List of the Parties as required by Supreme Court Rule 21.1(b). Instead, by footnote on page 1 of their brief, they seek to drop Flora Falcon and Rita Gomez, Pharr-San Juan-Alamo Independent School District and Arturo Guerra as parties. Respondents object to Petitioners' action in this regard. Rita Gomez and her Next Friend, Flora Falcon were Plaintiffs at the time of trial in the District Court, Appellants on the appeal to the United States Court of Appeals for the Fifth Circuit, Appellants on the Petition for Rehearing and Appellants on the Suggestion for Rehearing En Banc. This action has been taken without any motion, order, leave to amend or show of authority to drop a party. Its purpose is a transparent attempt to hide or distort two issues:

(1) That the statute applies to all persons equally, whether their parents only live in a different country, state or school district and does not apply only to students traveling form Mexico to attend school in a Texas school district; and

(2) That the statute applies to both primary and secondary education.[1]

---

1. Rita is fifteen (15) years of age and Rita's parents live in the state of Idaho. (Brief for Appellants in the United States Court of Appeals for the Fifth Circuit, p. 4).

Therefore, the parties should be listed as follows:

Dr. M. L. Brockette, Texas Commissioner of Education
The Texas Education Agency
Pharr-San Juan-Alamo Independent School District
Augusto Guerra, Superintendent
McAllen Independent School District
Rodney Cathey, Superintendent
Flora Falcon, of Pharr, Texas
Rita Gomez, of Pharr, Texas
Oralia Martinez, of McAllen, Texas
Roberto Morales, of McAllen, Texas

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
LIST OF PARTIES I
TABLE OF AUTHORITIES IV
OPINIONS BELOW 1
JURISDICTION 1
STATUTES INVOLVED 1
STATEMENT OF THE CASE 2
ARGUMENT 5

Reasons Why The Writ Should Not Be Granted

A. §21.031, Texas Education Code, Does Not Deprive American Citizens Of An Education 5

B. Both The District Court And The Court Of Appeals Correctly Held That The State Of Texas' Interests In Enacting §21.031(d) Were Sufficient 8

C. The Court Of Appeals Correctly Interpreted United States Supreme Court Precedent Related To Right To Travel Cases 11

D. §21.031(d) Does Not Create An Irrebuttable Presumption. Motive Or Intent For Moving To A School District Or State For Educational Purposes Has Been A Determinative Factor In Cases Cited Or Reviewed By The Supreme Court 14

E. *Toll v. Moreno* Is Not Closely Related To The Issues In This Case 15

CONCLUSION 17

APPENDIX:

Attorney General Opinion No. H-63 ..... A1
Attorney General Opinion No. O-1579 ..... A7
Attorney General Opinion No. O-2033 ..... A11

CERTIFICATE OF SERVICE A14

TABLE OF AUTHORITIES

CASES

Andre v. Board of Trustees of Village of Maywood, 561 F2d 48 (7th Cir. 1977); cert denied 434 U.S. 1013 (1978) 10-11, 12

Bright v. Baesler, 336 F.Supp. 527 (E.D. Ky., 1971) 11

Brownsville Independent School District v. Gamboa, 498 SW2d 448 (Tex. Civ. App.—Corpus Christi, 1973, ref'd n.r.e.) 7

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 7

Clarke v. Redeker, 259 F.Supp. 117 (S.D. Iowa, 1966) (three-judge court) 10, 14

Dandridge v. Williams, 397 U.S. 471 (1970) 11

DeLeon v. Harlingen Consolidated Independent School District, 552 SW2d 922 (Tex. Civ. App.—Corpus Christi, 1977, no writ) 7

Doe v. Plyler, 628 F2d 448 (5th Cir. 1980) 8

Dunn v. Blumstein, 405 U.S. 330 (1972) 11, 12

East Texas Guidance and Achievement Center, Inc. v. Brockette, 431 F.Supp. 231 (E.D. Tex., 1977) (three-judge court) 10

Hayes v. Board of Regents of Kentucky State University, 495 F2d 1326 (6th Cir. 1974) 10, 12, 14

In Re: Alien School Children, 501 F.Supp 544 (S.D. Tex., 1980) 8

Katzenbach v. Morgan, 384 U.S. 641 (1965) 7
Kelm v. Carlson, 473 F2d 1267 (6th Cir. 1973) 10, 12, 14
Kirk v. Board of Regents of California, 273 Ca. App. 2d 430; 78 Ca. Rptr. 260 (1969); appeal dism'd 396 U.S. 554 (1970) 10, 14
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 11
McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) 11
McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969) 11
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 10, 12
Moreno v. University of Md., 645 F2d 217 (4th Cir. 1981) 15
Morris v. Gilmer, 129 U.S. 315 (1889) 14
Palmer v. Thompson, 403 U.S. 217 (1971) 6, 13
Plyler v. Doe, No. 80-1538, Prob. Juris. noted 49 USLW 3824 (May 4, 1981) 8
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 7, 9, 11, 13
Shapiro v. Thompson, 394 U.S. 618 (1969) 11, 12, 16
Shivelhood v. Davis, 336 F.Supp. 1111 (D. Vt., 1971) 11
Spriggs v. Altheimer, Arkansas School District No. 12, 385 F2d 254 (8th Cir. 1967) 7, 14
Starns v. Malkerson, 326 F.Supp. 234 (D. Minn., 1970) (three-judge court); affirmed 401 U.S. 985 (1971) 10, 12, 14, 16
Sturgis v. State of Washington, 368 F.Supp. 38 (W.D. Wash., 1973) (three-judge court); affirmed 414 U.S. 1057 (1973) 10, 12, 14

Texas v. Certain Unnamed Alien School Children, No. 80-1934, Prob. Juris. noted 49 USLW 3930 (June 15, 1981) 8

Toll v. Moreno, No. 80-2178, 50 USLW 3215 (October 6, 1981) 15, 16

Usery v. Turner Elkhorn Mining Company, 428 U.S. 1 (1976) 15

Vlandis v. Kline, 412 U.S. 441 (1973) 9, 10, 12, 14, 16

Walsh v. Louisiana High School Athletic Association, 616 F2d 152 (5th Cir. 1980) 7

Weinberger v. Salfy, 422 U.S. 749 (1975) 15

Wright v. City of Jackson, 506 F2d 900 (5th Cir. 1975) 10, 12

STATUTES

§12.04, Texas Family Code 6

§14.02, Texas Family Code 6

§21.031, Texas Education Code ..... *passim*

§21.031(d), Texas Education Code ..... *passim*

No. 81-857

In the Supreme Court of the United States

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ORALIA MARTINEZ, as next friend of ROBERTO MORALES, *Petitioners,*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Opinions Below are included in the Appendix to Petitioners' Petition for Certiorari.

JURISDICTION

Respondents do not contest this Court's jurisdiction.

STATUTES INVOLVED

Petitioners set forth the statutes involved.

STATEMENT OF THE CASE

Petitioners' Statement of the Case was incomplete and inaccurate. Respondents desire to supplement and correct Petitioners' Statement.

Both Petitioners, Morales and Gomez, live in the McAllen Independent School District and Pharr-San Juan-Alamo Independent School District with persons other than their parents, guardians, or persons having lawful control over them under a court order, for the primary or sole purpose of attending school and intend to reside there only until they complete their education. 482 F.Supp. at 213, 214 (ff. 3, 4, 5, 6, 10, 16; Pet. App. B., pp. 3, 4, 6, 8). Contrary to Petitioners' representations on pages 5 and 6 of their brief, neither has established a domicile or residence in the School District, the District Court did not so find or hold and expressly determined otherwise. 482 F.Supp. at 219, 221, 222 (Pet. App. B., pp. 32, 33, 34).

Reports submitted by the McAllen Independent School District covering children from other countries and states and school districts in Texas, who do not live with a parent or guardian, that request attendance in the McAllen Independent School District, reflect that of the children in this category, only five of fifty-six were denied admission, 482 F.Supp. at 216 (Pet. App. B., pp. 15-16), three from the United States and two from Mexico. (Plaintiffs' Ex. 7). Students living apart from their parent or guardian because of physical health or emotional well being, broken homes, health reasons, etc. are all allowed to qualify for free public school in the Defendant School Districts. 482 F.Supp. at 220 (Pet. App. B., p. 36). The administrators of the Defendant School Districts have been more than liberal in finding that the children are bona fide residents of the School District, and an analysis of the records submitted

showed that the children living within the School District with someone other than their parent or legal guardian will be admitted to school if any reason exists for such situation other than solely attending school. 482 F.Supp. at 268 (ff. 39; Pet. App. B., pp. 16-17).

Petitioners are not denied or deprived of all opportunity to obtain an education because they can obtain a guardianship, have the person they reside with obtain custody over them under a court order, return to their parents to obtain an education, or have a reason other than education for their presence in the school district, as did over ninety (90%) percent of the children who came under this category in the report submitted by the McAllen Independent School District. 482 F.Supp. at 220 (Pet. App. B., pp. 35, 36).

The Stipulated Facts (Defendants' Ex. 1) and the Court's Findings of Fact, 482 F.Supp. at 215, 216 (ff. 26-34, 36; Pet. App. B., pp. 11-15), reflect that the experience of the superintendents testifying and their investigation into the problems of the students' interstate and intrastate transfers into a school district for the main purpose of being educated reveal that without the bona fide residency requirement contained in §21.031(d), the Defendant School Districts, along with the other school districts in the State, would suffer detrimental consequences caused by the immediate enrollment of thousands of children from other states, countries and other school districts located within the State of Texas.

The enrollment figures would also increase significantly in future years, causing overcrowded classrooms and related facilities, requiring the purchase of additional books, equipment, supplies and other customary items of support; and requiring the employment of significantly more teachers and specialized teachers for bilingual and

bicultural programs. This would probably adversely affect the educational programs of all the school districts and require significant increases in the school's budgets.

Neither the State of Texas, nor the Texas Education Agency, nor the United States of America, provides funds to assist school districts with educating Petitioners or children similarly situated. This burden falls exclusively upon the local school district. Some school districts are presently taxing at the maximum rate allowed by law and have no means to obtain more financial assistance. Most of the children in Petitioners' category do not pay any local school or state taxes or tuition, and therefore, their education would be funded and paid for by the resident taxpayers of the State of Texas and the school district.

The increasing number and fluctuating school population would make it impossible to predict enrollment figures—even on a semester by semester basis, causing over or under estimates on teachers, supplies, materials, etc. The children in this case and others similarly situated live with a person who does not have legal authority over them and who cannot give permission for field trips, sports activities or other activities requiring permission.

The intrastate and interstate transfers would, in all probability, have a detrimental effect on the educational standards of the Defendant School Districts and the other school districts in the State of Texas. (Defendants' Ex. 1) 482 F.Supp. at 215-216 (ff. 26-34, 36; Pet. App. B., pp. 11-15).

The sections of the Education Code apply to intrastate school district transfers, as well as transfer of children from other states and other countries, 482 F.Supp. at 215 (ff. 27; Pet. App. B., p. 12), and even apply to attempted transfers between different school districts within the same county. 482 F.Supp. at 222 (Pet. App. B., p. 44).

The Legislative Committee in the House of Representatives, when this legislation was enacted, noted that the proposed legislation was merely a codification of many years of Attorney Generals' Opinions and case law defined "residency" with respect to a minor child who depends on its residence for admission into the state's public free school system, as well as an alarming concern for the increased immigration of persons from Mexico and the school districts on the Texas-Mexico border. (Plaintiffs' Ex. 6; Defendants' Ex. 3). A study conducted in school districts located in thirteen counties adjacent to the Texas-Mexico border in 1975-1976, analyzed the problems connected with the immigration of students from Mexico and stated the desire of the school district administrators to have a statutory definition of "resident". (Defendants' Ex. 2).

ARGUMENT

Reasons Why the Writ Should Be Denied

A.

§21.031, Texas Education Code Does Not Deprive American Citizens Of An Education.

There *is* access to a tuition-free education for children who do not live with a parent, guardian or person having custody of them under a court order in the situations presented as follows:

(1) If the child has a reason other than its education for its presence in the school district. The evidence and findings show this to be the case in over ninety (90%) percent of the situations in this category in the McAllen Independent School District.

(2) If the child obtains a guardianship, temporary guardianship or other court order appointing the person to have custody of the child. Even indigents now have access to free legal representation and may obtain this service.

(3) If the child returns to live with its parents, whether the parents' residence be in Idaho, Mexico or some other town in Texas. Indeed two school districts could be in the *same* city, if the city, like many in Texas and other states, has more than one school district.

The Petitioners, having parents who are Mexican citizens, incorrectly categorize and confine the argument to the statute's exclusion of illegal aliens and children of aliens; however, §21.031(d) applies and is applied equally to all children alike. *Palmer v. Thompson*, 403 U.S. 217 (1971).

The ability of a minor child to establish its own domicile or residence for school purposes was determined by the District Court in this case, using Texas Law as follows:

> "Under Texas common law, a minor is 'not sui juris, and can neither select nor change its domicile, which is fixed by law as that of its father.' *Smith v. Ansley*, 257 SW2d 156, 157 (Tex. Civ. App.—Waco, 1953, writ ref'd. n.r.e.); see *Bradshaw v. Peacock*, 194 SW2d 551, 554 (Tex. Sup. Ct. 1946); *Mills v. Howard*, 228 SW2d 906, 907 (Tex. Civ. App.—Amarillo, 1950, no writ); see generally *Restatement of Conflicts of Law* §11 (1934)." 482 F.Supp. at 221 (Pet. App. B., p. 40).

Although the State Legislature in §12.04 and §14.02, Texas Family Code, has provided for the child's domicile to be that of its parents or managing conservator, it has relaxed this standard and the common law presumption with respect to residency for educational purposes; pur-

suant to §21.031(d), a child may establish his residence for school purposes if there is any reason for his presence in a school district, other than obtaining an education.

The children involved in this case are not in a natural situation, that is, they are not living with their parents, guardians or persons having custody of them under a court order. In enacting this legislation, the legislature granted and gave children in this category, who were not living in the school district for the primary purpose of attending school, the statutory right to attend school tuition-free.

A statute should not be held invalid because it could have gone farther than it did. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 38, 39 (1973); *Katzenbach v. Morgan,* 384 U.S. 641 (1965); *City of New Orleans v. Dukes,* 427 U.S. 297, 304, 305 (1976); *Walsh v. Louisiana High School Athletic Association,* 616 F2d 152, 161 (5th Cir. 1980).

This statutory definition of residency was passed to codify Attorney Generals' Opinions and case law determining and defining a student's bona fide residence which had been in existence for over seventy years. Three Attorney Generals' Opinions on this point are attached as an Appendix to Respondents' brief. (Res. App. 1-12). See also *Brownsville Independent School District v. Gamboa,* 498 SW2d 448 (Tex. Civ. App.—Corpus Christi, 1973, ref'd n.r.e.); *DeLeon v. Harlingen Consolidated Independent School District,* 552 SW2d 922 (Tex. Civ. App.—Corpus Christi, 1977, no writ); *Spriggs v. Altheimer, Arkansas School District No. 22,* 385 F2d 254, 259 (8th Cir. 1967). Also, the statutory definition contained in §21.031(d) was passed to give administrators a statutory guideline to follow in determining bona fide residency. 482 F.Supp. at 216. (Pet. App. B., p. 15).

The cases cited by Petitioners, *Texas v. Certain Unnamed Alien School Children*, No. 80-1934, Prob. Juris. noted 49 USLW 3930 (June 15, 1981) of *In Re: Alien School Children*, 501 F.Supp. 544 (S.D. Tex., 1980) and *Plyler v. Doe*, No. 80-1538, Prob. Juris, noted 49 USLW 3824 (May 4, 1981) of *Doe v. Plyler*, 628 F2d 448 (5th Cir. 1980) are not in point with this case. The alien cases involve only children who are not required to be admitted due to their unlawful presence in the country. In fact, the Appellees in the alien cases concede the validity of the provisions of §21.031(d). (Brief for Appellees, No. 80-538, pp. 29, 38). The statute in the alien cases differentiates between children unlawfully in the United States and all others; by contrast, the statute under scrutiny in this case applies to everyone equally. §21.031(d) applies to interstate and intrastate transfers as well as transfers between the individual school districts within the same county. 482 F.Supp. at 222 (Pet. App. B., p. 44). As stated previously, there also is no complete denial of access to a tuition-free primary or secondary education in this case.

B.

Both The District Court And The Court Of Appeals Correctly Held That The State Of Texas' Interests In Enacting §21.031(d) Were Sufficient.

The Court of Appeals correctly stated that the State's interests are sufficient under either the strict scrutiny or rational basis standard of judicial review. The District Court, although correctly holding that the rational basis form of review was the appropriate standard, listed in its findings and conclusions many reasons to support compelling state interests and the record is replete with evidence to support the findings and conclusions.

The Trial Court determined that the influx of thousands of students from interstate, intrastate and interdis-

trict transfers would have a detrimental effect on the educational standards of the Defendant School Districts, as well as the other school districts in the State of Texas. 482 F.Supp. at 215 (ff. 32; Pet. App. B., p. 14). Protection and preservation of the quality of the State's schools was discussed by the Court in *Vlandis v. Kline*, 412 U.S. 441, 453 (1973), when it recognized the right of bona fide residents to attend school on a preferential tuition basis. This is vitally important to a state's interest and the quality of the state's primary and secondary schools is even more compelling.

The migration of thousands of students would increase the likelihood of the disruption of the integration plans of the United States of America, the State of Texas and the school districts. It would open the door for a migration of white students to white school districts and black students to black school districts. Transfers for athletic reasons would be prevalent. A school district in a city having a fine special education program would be inundated with handicapped children from surrounding school districts within the same city, or school districts in the same county or state.

The vast influx of thousands of students and large fluctuations of student populations would make it impossible to predict enrollment figures, causing incorrect estimates of teachers, aides and other support personnel, resulting in over and under estimates of budgets and tax levies. These factors and others found by the Trial Court create compelling state interests, either individually or when taken collectively.

§21.031 neither involves a fundamental right protected by the United States Constitution, *San Antonio Independent School District, supra,* nor is aimed at any suspect class of people. It applies and is applied to all persons equally.

Although education is most desirable, it is not one of the basic necessities of life which one must have for survival such as food, clothing, medical attention and shelter. *Kirk v. Board of Regents of California*, 273 Ca. App. 2d 430; 78 Ca. Rptr. 260 (1969); appeal dism'd 396 U.S. 554 (1970); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn., 1970) (three-judge court); affirmed 401 U.S. 985 (1971). Therefore, it should be construed under the rational basis test rather than the compelling state interest test. *East Texas Guidance and Achievement Center, Inc. v. Brockette*, 431 F.Supp. 231 (E.D. Tex., 1977) (three-judge court).

The college tuition cases determined or reviewed by this Court and by several Courts of Appeals[2] raised issues either exactly or similar to the issues raised by Petitioners in this case. The holding in all of these cases is that the rational basis test is the proper one to apply. The Court, in *Vlandis, supra*, allowed the state to establish "reasonable criteria" for the determination of bona fide residency with respect to college students.[3] What could be unreasonable about a definition of residency which permitted over ninety (90%) percent of the students in the particular category to be admitted into school tuition-free?

In the cases of *Wright v. City of Jackson*, 506 F2d 900 (5th Cir. 1975) and *Andre v. Board of Trustees of Village of Maywood*, 561 F2d 48 (7th Cir. 1977); cert. denied 434

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2. *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn., 1970) (three-judge court); affirmed 401 U.S. 985 (1971); *Sturgis v. State of Washington*, 368 F.Supp. 38 (W.D. Wash., 1973) (three-judge court); affirmed 414 U.S. 1057 (1973); *Kirk v. Board of Regents of University of California*, 273 Ca. App 2d 430; 78 Ca. Rptr. 260 (1969); appeal dism'd 396 U.S. 554 (1970); *Hayes v. Board of Regents of Kentucky State University*, 495 F2d 1326 (6th Cir. 1974); *Kelm v. Carlson*, 473 F2d 1267 (6th Cir. 1973); *Clarke v. Redeker*, 259 F.Supp. 117 (S.D. Iowa, 1966) (three-judge court).

3. *Id.*, at 453-454.

U.S. 1013 (1978), bona fide residency statutes were reviewed under the rational basis test rather than the strict scrutiny standard of review.

The cases cited by Petitioners, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bright v. Baesler*, 336 F.Supp. 527 (E.D. Ky., 1971); and *Shivelhood v. Davis*, 336 F.Supp. 1111 (D. Vt., 1971) are not applicable to the facts of this case because they concern situations where fundamental constitutional rights are involved. Further, the parties had established a bona fide residence and domicile in the particular states.

Petitioners basically argue that this legislative definition of bona fide resident for school purposes is not as suitable as it could be, or that a better definition could be obtained, or that some inequities occur and that the definition is somewhat imperfect. These contentions are uniformly raised by plaintiffs in cases attacking the constitutionality of certain statutes and are uniformly rejected. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969); *San Antonio Independent School District v. Rodriguez, supra.*

C.

The Court Of Appeals Correctly Interpreted United States Supreme Court Precedent Related To Right To Travel Cases.

The United States Supreme Court has determined that impairment of a person's right to travel is restricted to durational residency statutes. *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). The Court, in *Shapiro*, 394 U.S. at 626, specifically differentiated between a residence requirement and a one-year waiting pe-

riod and held only the waiting period unconstitutional. *Id.* at 636. The Court, likewise in *Dunn*, 405 U.S. at 343, and *Memorial Hospital*, 415 U.S. at 254-255, differentiated between durational statute and a statutory requirement of bona fide residence. *Vlandis*, 412 U.S. at 453-454, gives authority for a state to do exactly what the State of Texas did in enacting the statute in question by stating:

> ". . . The state can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state, but who have come there solely for educational purposes, cannot take advantage of the in-state rates."

College tuition cases reviewed and affirmed by this Court[4] specifically support this position of rejecting the contention of impairment of a student's right to travel, as does *Hayes, supra; Wright, supra; Andre, supra;* and *Kelm, supra.*

Under statutory and common law, minor students do not have the legal capacity to establish a residence or domicile by themselves. The only way a student can establish a residence for school purposes is under the provisions of §21.031 using the criteria set forth in the cases and Attorney Generals' Opinions that the statute codified.

The cases cited by Petitioners on this point all involve bona fide residents. By living in the school district for the purposes of obtaining an education, the children in this case are just like students at a boarding school. These minor students are no more residents of these school districts than they would be residents of a city or school district in which the boarding school they attended was located.

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4. *Starns v. Malkerson, supra; Sturgis v. State of Washington, supra.*

The statute in this case is not durational as in the cases cited by Petitioners. Furthermore, the statute applies equally to all persons, regardless of nationality, race or wealth; to interstate, intrastate and interdistrict transfers and to both primary and secondary education. The statutes in the cases cited by Petitioners created two classes of bona fide residents and infringed upon a fundamental right protected by the United States Constitution. §21.031 (d) does not create two classes of bona fide residents and no fundamental right protected by the United States Constitution is involved in this case. *San Antonio Independent School District, supra.*

Petitioners attempt to inject discrimination against persons migrating from Mexico into the case as the purpose for §21.031. This is not only improper because Petitioners abandoned this contention in the Trial Court, and limited the judicial review to a facial attack on the constitutionality of the statute, 482 F.Supp. at 216 (Pet. App. B., p. 17), but is also without merit. The evidence presented to the Court and the Court's findings reflect otherwise and determine that the statute is applied equally to all persons alike. *Palmer v. Thompson,* 403 U.S. 217, 224 (1971). Only two of the five students rejected out of the 56 in this category taking an application for admission at McAllen Independent School District were from Mexico. The other three were from other locations in the United States. (Plaintiffs' Ex. 7). The record reflects that the school district administrators desired a statutory residency definition for students not residing with parents or guardians and that the statute is a codification of the definition contained in case law and Texas Attorney Generals' Opinions since 1905. (Res. App. B., pp. 1-11).

D.

§21.031(d) Does Not Create An Irrebuttable Presumption. Motive Or Intent For Moving To A School District Or State For Educational Purposes Has Been A Determinative Factor In Cases Cited Or Reviewed By The Supreme Court.

Petitioners contend that the motive of a student living in a school district, apart from his parents, guardian or person having lawful control over it by court order, who seeks a tuition-free education from the school district is of no importance and cannot be considered as a basis of a determination of bona fide residence. Petitioners cite no authority which bears directly on this point and ignore the legions of cases, United States Supreme Court and other, which specifically state and hold to the contrary.[5] The square holding of one of the cases cited by Petitioners, *Morris v. Gilmer*, 129 U.S. 315 (1889) is that the motive of a person establishing a temporary residence for a purpose with the intent to return to that person's former residence after the purpose is fulfilled does *not* establish a residence in the state the person moves to for such purpose. In the case before this Court, each of the student Petitioners intend to leave the school district when their education is completed. 482 F.Supp. at 214 (ff. 10, 16; Pet. App. B., pp. 6, 8). Since the original action was initiated, many of the original Plaintiffs have dropped out, presumably because they returned to their homes and real places of residence. In *Vlandis, supra*, the Court recognized as a legitimate state purpose charging higher tuition rates to those "who have come there solely for educational purposes". *Id.* at 453-454.

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5. *Vlandis v. Kline, supra; Sturgis v. State of Washington, supra; Starns v. Malkerson, supra; Kirk v. Board of Regents of University of California, supra; Hayes v. Board of Regents of Kentucky State University, supra; Clarke v. Redeker*, 259 F.Supp. 117 (S.D. Iowa, 1966) (three-judge court); *Spriggs v. Altheimer, Arkansas School District No. 22, supra; Kelm v. Carlson, supra.*

§21.031(d) has the characteristics of the statute which was under question in *Weinberger v. Salfy*, 422 U.S. 749, 772 (1975), by making the benefits available upon compliance with objective criteria, rather than making compliance impossible or even difficult to achieve. If an adverse determination is made, the student has an appeal process to the Commissioner of Education for the State of Texas and the Board of Education of the State of Texas. (Defendants' Ex. 4). Both the statute and the reports submitted by the School Districts show that the presumption is easily rebuttable. Indeed, over ninety (90%) percent of the students in this category applying for admission in the McAllen Independent School District rebutted this presumption without an appeal. The two District Judges, Kazen and Garza, found that the children in the Plaintiffs' category were being admitted to school if any reason existed for such situation other than solely attending school. 482 F.Supp. at 216, 220 (Pet. App. B., pp. 16, 35, 36).

Recent cases cited by the Supreme Court indicate that once the constitutionality of a classification is sustained against an equal protection attack, it has also survived an irrebuttable presumption due process challenge. *Weinberger v. Salfy*, 422 U.S. at 769-770; *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1, 24 (1976).

E.

Toll v. Moreno Is Not Closely Related To The Issues In This Case.

Toll v. Moreno, No. 80-2178, 50 USLW 3215 (October 6, 1981) granting cert. to *Moreno v. University of Md.*, 645 F2d 217 (4th Cir. 1981) involves similar issues as this case; however, the facts of the case, the holdings and the reasoning of the courts in *Toll, supra*, and this case, are not related at all. *Toll*, involves students who apparently are bona fide residents; a regulation absolutely depriving the students of an opportunity to attend school on an in-state

tuition basis and an alleged violation of the Supremacy Clause. This case involves minors who are not bona fide residents of the school districts and a statute having a presumption that is easily rebuttable and that applies equally to everyone. In *Toll*, the holding of the Court of Appeals and the District Court was that the regulation created an irrebuttable presumption and violated due process using the authority of *Vlandis, supra*. This holding relates to due process only and has no bearing on the other statements made by the Supreme Court in *Vlandis*, which the Court of Appeals relied upon in its decision in this case. Both the District Court and the Court of Appeals in this case determined that there was no irrebuttable presumption; therefore, *Vlandis, supra*, did not apply at all to that particular theory.

There is no conflict in the Courts' holdings of *Starns, supra; Vlandis, supra;* and *Shapiro, supra*. As previously noted, this case is entirely dissimilar from the alien cases before this court.

Petitioners misquote *Shapiro, supra*, on page 33 of their brief when they state:

> "Yet financial interests are not sufficient to deny education to 'those who move to take advantage of better educational opportunities' *Shapiro*, 394 U.S. at 632."

Putting the statement with the correct quotation from *Shapiro*, the sentence would read:

> "Yet financial interests are not sufficient to deny education to 'A mother who moves into a particular state in order to take advantage of its better educational facilities.' *Shapiro*, 394 U.S. 632."

If the mother from the facts just correctly quoted from *Shapiro* presented her child to the School Districts in this case or any school district in Texas for education, it would be admitted into school tuition-free.

CONCLUSION

The Court of Appeals for the Fifth Circuit correctly held that §21.031(d) was constitutional and the Petition for Certiorari should be denied, or if granted the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

TRAVIS HIESTER
(Counsel of Record)
ATLAS & HALL
P. O. Drawer 3725
McAllen, Texas 78501
(512) 682-5501
Attorneys for Respondents, Rodney Cathey and McAllen Independent School District

MARK WHITE
Attorney General of Texas
JOHN W. FAINTER, JR.
First Assistant
RICHARD E. GRAY, III
Executive Assistant
PAUL R. GAVIA
Chief, State and County Affairs
RICHARD ARNETT
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131
Attorneys for Respondents, Dr. M. L. Brockette and The Texas Education Agency

APPENDIX

THE ATTORNEY GENERAL
OF TEXAS

Austin, Texas 78711
July 12, 1973

John L. Hill
Attorney General

Honorable Dr. J. W. Edgar
Commissioner of Education
Texas Education Agency
201 E. Eleventh Street
Austin, Texas 78701

Opinion No. H-63

Re: The application of the Texas laws governing residence of minor school-age children for public school attendance purposes.

Dear Dr. Edgar:

You have submitted several specific questions to us concerning the appropriate district for a minor to attend school. Generally attendance is governed by § 21.031(b) and (c) of the Texas Education Code:

> "(b) Every child in this state over the age of six years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district *in which he resides* or *in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission notwithstanding the fact* that he may have been enumerated in the scholastic census of a different district

or may have attended school elsewhere for a part of the year.

"(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons over six and not over 21 years of age at the beginning of the scholastic year if such *person or his parent, guardian or person having lawful control resides within the school district.*" (emphasis added).

While "residence" may have various meanings for various purposes, and despite the fact that normally the residence of a minor is that of his parents [*Gulf, C&S. F. Railway Co. v. Lemons,* 206 S. W. 75 (Tex. 1918)], the term has received a particular interpretation for school purposes since 1905 when, in an opinion to the then State Superintendent of Public Instruction, the Attorney General said:

"If the children have merely an ostensible and not a substantial residence in the district, if they were sent to Rockdale for the sole purpose, or even for the main purpose, of participating in the advantages of the public schools of Rockdale, they are not entitled to free tuition.

"But if they were sent to reside in Rockdale in good faith in order to give them suitable homes, with the intention on the part of the father, and of the persons in whose care he placed them, that the children should reside there permanently; if the educational advantages of the residents in Rockdale were merely incidental to their going there, and other considerations induced the father, in good faith, to select that place as their home, I think the children are residents of Rockdale within the meaning of the school law, and entitled to free tuition there, notwithstanding that the domicile of the father is elsewhere"

Referring to the foregoing language, this office in Attorney General Opinion No. O-586 (1939) added:

> "While we recognize that a minor child may acquire a bona fide residence separate and apart from its parents within the contemplation of our school laws, we do not think that such bona fide residence is established by the mere physicial presence of the minor in another district for the purpose of attending school. School District No. 1, etc. v. School District (Sup. Ct. Mich. 1926), 211 N.W. 60; Yale v. West Middle School District, 59 Conn. 489, 13 L.R.A. 161; Anno. 26 L.R.A. 581."

These rulings have been followed in subsequent opinions of the Attorney General Nos. O-762 (1939); O-1384 (1939) and O-7176 (1946).

In the last cited opinion it was said, by way of illustration:

> "The question propounded by you involves a fact question. If the residence of the child in question has been established as a good faith substantial residence with her Aunt in District #2 it is our opinion that in such event the Aunt would be authorized to enumerate the child as a scholastic in District #2. However, if the residence of the child in District #2 is merely an ostensible residence for the purpose of attending school there and not a good faith substantial residence, then in such event our ruling would be that the child should be enumerated by its parents in District #1."

Your precise questions to us are as follows:

> "(1) Mother and father have and reside at home in School District A, minor child is living in District

B with grandmother or other relative to attend school in District B, but child spends weekends and summers in mother and father's home.

"Is minor child a bona fide resident of School District B for school purposes?

"(2) Mother and father are separated without legal proceedings being instituted. Mother, a resident in District A. Father, a resident in District B. The minor child is living at all time with mother in District A, and attends school in District A.

"Is the minor child a bona fide resident of District A for school attendance purposes?

"(3) Mother-father are residents of District A. Minor child, legal disabilities not removed by court, lives in apartment in District B, attends school and works to support himself in District B. Visits on weekends in mother-father home.

"Is minor child a bona fide resident of District B for school attendance purposes?

"(4) Mother-father are residents of District A. A guardianship, pursuant to law, has been obtained on minor child by a relative, a bona fide resident in District B. Minor child attends school in District B and resides with relative guardian.

"Is minor child a bona fide resident of District B for school attendance purposes?

"(5) Mother-father have a residence (own home) in District A. Mother-father also have a residence (rented home) in District B. The family including minor child spend about equal time at the two residences. The minor child attends school in District B.

"Is minor child a bona fide resident of District B?

"(6) Same situation as in 5 except the residence in District A is rented, and the residence in District B is owned.

"Is minor child a bona fide resident of District B?

"(7) Mother-father are separated. No court order. Child living with relative *for all purposes* with consent of mother and father. Child attending school in District where relative resides.

"Is the minor child a bona fide resident of the relative's district for school attendance purposes?

"(8) Same as 7 except mother-father not separated.

"Is the minor child a bona fide resident of the relative's district for school attendance purposes?"

Each of these presents a fact question as to the reason for the different residences, whether it is a bona fide residence as opposed to an "ostensible residence for the purpose of attending school." Each instance will have to be determined upon an examination of the detailed facts, which we do not have before us. In each instance the school official charged in the first place with responsibility for the decision will have to weigh all the facts and conclude that the residence is either bona fide or merely ostensible.

SUMMARY

Residence of a minor for the purpose of determining his eligibility for free public education under § 21.031 of the Texas Education Code, normally is that of his parents. Whether residence elsewhere qualifies the minor will depend upon whether the residence is

bona fide or is merely an ostensible residence for the purpose of attending a different school.

Very truly yours,

/s/John L. Hill
JOHN L. HILL
Attorney General of Texas

APPROVED:

/s/ Larry F. York
LARRY F. YORK, First Assistant

/s/ David M. Kendall, Chairman
DAVID M. KENDALL, Chairman
Opinion Committee

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

Gerald C. Mann
Attorney General

Hon. Homer P. Rainey, President
The University of Texas
Austin, Texas

Dear Mr. Rainey:

Opinion No. O-1579

Re: Legal residence of a minor who has been placed in his mother's custody.

We received your letter of October 6, 1939, followed by your letter dated November 3, 1939, in which you request our opinion on the following question:

"When a minor's parents are divorced and he is placed in the custody of his mother, does his legal residence follow that of his mother, who takes him to another state with the father's acquiescence?"

Article 2654c, Vernon's Revised Civil Statutes of Texas, provides in part as follows:

"A non-resident student is hereby defined to be a student of less than twenty-one (21) years of age, living away from his family and whose family resides in another state or whose family has resided within the state for a period of time less than twelve (12) months prior to the date of registration, or a student of twenty-one (21) years of age or over who resides out of the state or who has resided within the State for a period of less than twelve (12) months prior to the date of registration."

The terms "reside", "residence" and "domicile" have been given varied meanings and shades of meaning. In some instances they are construed to be different and in others they are held to be identical, depending upon the apparent stand in which they are employed when considered together with the whole context of a statute. It was stated in an opinion by this department dated September 13, 1933, addressed to Dr. H. Y. Benedict, that "reside" as used in this statute has the same meaning as "domicile". This same ruling was made in conference opinion No. 2977, dated January 10, 1936, Attorney General's Report 1934 to 1936, p. 114, directed to Dr. H. Y. Benedict.

"Where husband and wife are living apart under a juducial decree of divorce or separation, the wife may acquire a separate domicile of her own which will remain unaffected by any change of residence on the part of the husband. A divorced woman may select her own domicile, whether she is divorced a vinculo matrimonii, or only mensa et thoro." 19 Corpus Juris 417.

It is settled law in Texas that the residence or domicile of a minor child is ordinarily that of the father when the parents are not divorced. Gulf C. & S. F. Ry. Co. vs. Lemons, 206 S.W. 75. When a divorce has been granted to the wife, an unrestricted custody of the minor child given her in the decree, her own domicile establishes that of the child, even after her re-marriage. Hicks vs. Bucks, Supreme Court of Minn., 83 NW 538; 9 R.C.L. 548.

The view that the child's domicile follows that of its mother rather than that of its father, where she has a separate domicile and has been awarded the custody of the child, was taken in Toledo Traction Company vs. Cameron, 137 Fed. 48, in reply to the contention that the father's domicile in Chio, in which state the wife was granted a divorce with custody of the child, determined that of the

child who was taken by the wife to another stated and lived there with her, and that accordingly the child was not entitled to sue in a Federal Court as a citizen of the other State. The Court said:

"It is doubtless true that the general rule is that the domicile of the child follows that of the father. But this rule does not hold when the parents are judicially separated, and the custody of the child is awarded to the mother. . . . It would be inconsistent with such a decree that the domicile of the child should continue to be that of the father; for the custody and control of the child, upon which the father's domicile is imputed to the child, no longer exists, but is transferred to the mother."

In Griffin vs. Griffin, 187 Pacific 598, where a wife was granted a divorce in California with custody of the children, and subsequently obtained the court's conditional permission to take them out of its jurisdiction, but disregarded the condition to return them, their father having apparently remained in that state, it was said:

"We know of no law that would prevent the mother from changing her domicile to another state, and, upon compliance with the decree, taking the children with her. The children being in the care and custody of the mother, her residence is their residence. Such is the natural effect of a decree of divorce."

In our opinion your question, as we have restated it at the beginning of this opinion, should be answered in the affirmative.

We have also been furnished with certified copies of instruments showing the removal of the student's disabilities as a minor, in the 37th District Court of Bexar County on September 7, 1939. Whether or not this judgment is binding on the University is a question which we deem it

unnecessary for us to determine. The most that the judgment could establish, relative to the minor's residence, was that he was a resident of Texas at the time of the proceeding. And, even if the judgment is binding upon the University, he is a non-resident within the meaning of Article 2654c until he has resided within the State for twelve months. As we have seen, his residence was with his mother, a non-resident, at least up to the time of the judgment.

Yours very truly

ATTORNEY GENERAL OF TEXAS
By /s/ Hirschie Johnson
Hirschie Johnson
Assistant

HJ:RS:egw
APPROVED JAN 10, 1940
/s/ Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

APPROVED
Opinion Committee
By B W B
Chairman

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
Austin

Honorable M. F. Kieke
County Attorney
Lee County
Giddings, Texas

Dear Sir:

Opinion No. 0-2033

Re: Residence of scholastics for purpose of scholastic census enumeration.

We are in receipt of your letter of March 1, 1940, in which you request the opinion of this department as to whether certain children should be enumerated in school district No. 1. or school district No. 2. in taking the school census.

You state that A owns two furnished houses, one of which is located in school district No. 1 and the other in school district No. 2. He resided in school district No. 1 until about the week before the first day of April at which time he moved to his house in school district No. 2 where his children had been staying for six months with their aunt while attending school. You further state that on the 1st day of April, A and his wife resided in their residence in school district No. 2 and intended to send their children to the school in said district No. 2.

Article 2816, Revised Civil Statutes, 1925, provides for the appointment of a census trustee on the 1st day of each January or as soon thereafter as practicable. It is further provided:

> "The census trustee between the 1st day of March and the 1st day of April after his appointment shall take a census of all the children that will be over seven and under eighteen years of age on the 1st day of the following September and who are residents of the school district on the 1st day of April."

The trustee is required to visit the residence and by actual observation and interrogation determine the residence and other facts required to be set out in the census. The person rendering the children is required to subscribe and swear to the information furnished.

As pointed out in your letter the question of residence is largely dependent upon the intention of the person in question and resolves itself into a question of fact. The general rule is well established that the residence or domicile of an infant is ordinarily that of the parent. If the father is living the domicile of the family and the child follows that of the father. 9 RCL 547; Gulf, C & S F Ry. Co. vs. Lemons, 109 Tex. 244, 206 SW 75, 4 ALR 943; Deterly vs. Wells (T.C.A. 1932) 53 SW (2d) 847.

While this department is not authorized to pass upon questions of fact, if the facts set out in your letter are accepted as true and A moved from his house in district No. 1 to his house in district No. 2 prior to April 1st, with the intention of relinquishing his residence in district No. 1 and establishing his residence in district No. 2, we are of the opinion that such facts would be sufficient to establish his residence in district No. 2 as of April 1st for the purpose of scholastic enumeration of his children who were also in district No. 2. The residence of the minor children being that of the father, and assuming that under all the facts and circumstances the father has changed the

residence of the family to district No. 2, his minor children should be enumerated in such district.

Yours very truly

ATTORNEY GENERAL OF TEXAS
By /s/ Cecil C. Cammack
Cecil C. Cammack
Assistant

CCC:RS
APPROVED MAR 9, 1940
/s/ Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

APPROVED
Opinion Committee
By B W B
Chairman

CERTIFICATE OF SERVICE

I, Travis Hiester, a member of the Bar of the Supreme Court of the United States and counsel of record for Rodney Cathey and McAllen Independent School District, hereby certify that on December 7th, 1981, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Reply of Respondents to Petition for Writ of Certiorari on Mr. James A. Herrmann, Texas Rural Legal Aid, Inc., 305 E. Jackson, Suite 206, Harlingen, Texas 78550.

All parties required to be served have been served.

DATED the 7th day of December, 1981.

TRAVIS HIESTER
ATLAS & HALL
P. O. Drawer 3725
McAllen, Texas 78501
(512) 682-5501

Amicus Brief

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CLERK

No. 81-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ORALIA MARTINEZ, as next friend of ROBERTO MORALES,
Petitioner,

—v.—

DR. M. L. BROCKETTE, as TEXAS COMMISSIONER OF EDUCATION; The TEXAS EDUCATION AGENCY; McALLEN INDEPENDENT SCHOOL DISTRICT; and RODNEY CATHEY, as Superintendent of McALLEN INDEPENDENT SCHOOL DISTRICT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION and the TEXAS CIVIL LIBERTIES UNION, *AMICI CURIAE,* IN SUPPORT OF PETITIONER

ROBERT S. OGDEN, JR.
Counsel of Record
KEVIN B. CLARK
DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100
Counsel For Amici Curiae

Of Counsel:

CHARLES S. SIMS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, New York 10006
(212) 944-9800

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
QUESTIONS PRESENTED	1
INTEREST OF AMICI CURIAE	3
SUMMARY OF ARGUMENT	6
I. SECTION 21.031(d) OF THE TEXAS EDUCATION CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	13
A. Statutes Which Impinge On Fundamental Rights Are Reviewable Under A Standard Of Strict Scrutiny	13
B. Section 21.031(d) Is Subject To Strict Judicial Scrutiny Under The Compelling State Interest Standard Because It Penalizes The Exercise Of The Fundamental Right To Travel	16
1. The Right To Travel Is Constitutionally Protected	16

TABLE OF CONTENTS (continued)

		Page
2.	Section 21.031(d) Impinges The Right To Travel Of Indigent Citizen Children By Denying An Education To Children On The Basis Of Their Purpose For Coming To Texas	17
3.	Denial Of Education Is A Serious Restriction Of The Right To Travel ...	22
C.	By Discriminating Against Children Who Are Sent By Their Parents To Live With Relatives, Section 21.031(d) Intrudes On The Fundamental Right To Freedom Of Choice In Family Living Arrangements	26
D.	At A Minimum Section 21.031(d) Is Subject To Review Under The Standard Expressed In Plyler v. Doe	34

TABLE OF CONTENTS (continued)

		Page
II.	SECTION 21.031(d) DENIES CHILDREN DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT BY CREATING AN UNFOUNDED, IRREBUTTABLE PRESUMPTION OF NON-RESIDENCY FOR CHILDREN WHO LIVE APART FROM THEIR PARENTS OR COURT-APPOINTED GUARDIAN AND WHOSE PRIMARY PURPOSE FOR LIVING IN TEXAS IS TO ATTEND PUBLIC SCHOOL	36
III.	THE INTERESTS OF THE STATE ARE INSUFFICIENT TO JUSTIFY THE STATUTE	46
	A. Deterrence Of Migration	47
	B. Conditioning Access To School On Whether A Child Lives With A Parent Or Court Appointed Guardian	48
	C. Preservation Of Limited Financial And Physical Resources	49
	D. Preservation Of Educational Quality	52
	E. Administrative Convenience	53
CONCLUSION		55

TABLE OF AUTHORITIES

CASES: Page

Arredondo v. Brockette,
482 F. Supp. 212
(S.D. Tex. 1979) 19, 23, 25, 44, 47, 50, 52, 54

Brown v. Board of Education,
347 U.S. 483 (1954) 24, 25

Brownsville Independent School
District v. Gamboa, 498 S.W.2d 448
(Tex. Civ. App. 1973) 31

Bullock v. Carter, 405 U.S. 134 (1972) 14

Carrington v. Rash, 380 U.S. 89 (1965) 40

Dunn v. Blumstein,
405 U.S. 330 (1972) 7, 13, 14, 15, 16

Eisenstadt v. Baird, 405 U.S. 438 (1972) 14

Gaddis v. Wyman, 304 F. Supp. 717
(S.D.N.Y. 1969), aff'd sub nom., Wyman v.
Bowens, 397 U.S. 49 (1970) 8, 20, 21, 22

Memorial Hospital v. Maricopa County,
415 U.S. 250 (1974) 7, 13, 16, 17

CASES (continued) Page

Moore v. East Cleveland,
431 U.S. 494 (1977) 8, 27, 28, 29

Oregon v. Mitchell,
400 U.S. 112 (1970) 16, 17

Plyler v. Doe, 50 U.S.L.W. 4650
(U.S. June 15, 1982) 8, 10, 23, 32, 33, 35, 43, 51-53

Police Dept. of Chicago v. Mosely,
408 U.S. 92 (1972) 14

San Antonio Independent School
District v. Rodriguez, 411 U.S. 1 (1973) .. 14

Shapiro v. Thompson,
394 U.S. 618 (1969) 8, 14, 16, 19, 20

Shelton v. Tucker, 364 U.S. 479 (1960) 15

Skinner v. Oklahoma, 316 U.S. 535 (1942) 28

Stanley v. Illinois, 405 U.S. 645 (1972) 54

Starns v. Malkerson, 326 F. Supp. 234
(D.Minn. 1970) aff'd,
401 U.S. 985 (1971) 25

Trimble v. Gordon, 430 U.S. 762 (1977) 33

CASES (continued) Page

United States v. Guest,
383 U.S. 745 (1966) 16

Vlandis v. Kline, 412 U.S. 441
(1973) 11, 25, 37, 38, 39, 40, 54

Weber v. Aetna Casualty & Surety Co.,
406 U.S. 164 (1972) 13, 33

Weinberger v. Salfi, 422 U.S. 749 (1975) 40

Williamson v. Osenton, 232 U.S. 619 (1914) .. 45

Zobel v. Williams, 50 U.S.L.W. 4613
(U.S. June 14, 1982) 13

U.S. CONSTITUTION:

Amend. XIV, § 1 ..... 6, 11, 13, 27, 33, 55

STATUTES:

Tex. Educ. Code Ann. § 21.031
(Vernon Cum. Supp. 1982) 23, 32, 35, 36, 43, 45

Tex. Educ. Code Ann. § 21.031(b)
(Vernon Cum. Supp. 1982) 37

Tex. Educ. Code Ann. § 21.031(c)
(Vernon Cum. Supp. 1982) 37

STATUTES (continued) Page

Tex. Educ. Code Ann. § 21.031(d)
(Vernon Cum. Supp. 1982) 1, 2, 6-11, 13, 6-18, 20, 23, 25, 26, 30, 34-37, 41, 43, 44, 46-50, 52-53, 55

Tex. Educ. Code Ann. § 54.052
(Vernon Cum. Supp. 1982) 18

Tex. Fam. Code Ann. § 11.04(c)(4)
(Vernon 1975) 45

Tex. Fam. Code Ann. § 11.04(c)(6)
(Vernon 1975) 45

QUESTIONS PRESENTED

1. Whether § 21.031(d) of the Texas Education Code violates the Equal Protection Clause of the Fourteenth Amendment by penalizing, through denial of access to public free schools, the Constitutional right to travel of citizen children who have come to Texas for the primary purpose of attending such schools and who live in Texas apart from their parents or court appointed guardian.

2. Whether § 21.031(d) of the Texas Education Code, irrespective of its effect on the right to travel, violates the Equal Protection Clause of the Fourteenth Amendment by establishing a discriminatory classification of residency, which intrudes on freedom of choice re-

garding family living arrangements.

3. Whether § 21.031(d) of the Texas Education Code violates the Due Process Clause of the Fourteenth Amendment by creating an irrebuttable presumption that children who live in Texas apart from their parents or court appointed guardian for the primary purpose of attending its public free schools are nonresident and therefore precluded from attending such schools.

INTEREST OF AMICI CURIAE 1/

The American Civil Liberties is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States. The Texas Civil Liberties Union is one of its state affiliates.

This case implicates constitutional rights for which the ACLU has frequently appeared in this Court: the right to equal protection of the law and the right to due process. By declining to provide an education to United States

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1/ Letters consenting to the filing of this brief have been lodged with the clerk.

citizen children residing apart from their parents if they have moved for the purpose of receiving a public education, the State of Texas penalizes the exercise of the right to travel, unjustifiably treats such children differently than it treats children living apart from their parents for other purposes, and unfairly presumes that such children are not residents of Texas even though they meet every objective test for residency Texas has established and despite the fact that motive for establishing residency is constitutionally irrelevant.

Amici submit this brief not only because vindication of such constitutional rights is always important, but also because upholding the Texas

classification at issue here would have the disastrous effect of ensuring the creation of an underclass of American citizens who, disadvantaged at the outset of their lives through no fault of their own, will be deprived of the educational tools essential to become productive and successful members of American society.

SUMMARY OF ARGUMENT

Section 21.031(d) violates the Equal Protection Clause of the Fourteenth Amendment. This section denies certain indigent children access to public free schools and thus deprives them of an education. The children so affected are those who live in Texas apart from their parents or court appointed guardian and whose primary purpose for being in Texas is to attend its public free schools.

A purpose of the section was to deter indigent children residing in Mexico from migrating to Texas in order to attend its public schools. Under § 21.031(d), children sent by their parents to live with relatives in Texas so that they can attend free public

school are barred from doing so even though they are United States citizens.

State action which infringes on a fundamental right is subject to strict scrutiny and must be justified by a compelling state interest. Dunn v. Blumstein, 405 U.S. 330 (1972). The right of U.S. citizens to travel to and live in any state is a fundamental right founded in the Constitution. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

Section 21.031(d) infringes on the fundamental right to travel because it penalizes the exercise of that right by excluding children from an important benefit on the basis of their motivation for coming to Texas. The strict scrutiny

standard applies to state action which deprives indigents of an important benefit because they have come into the state to obtain that benefit. Shapiro v. Thompson, 394 U.S. 618 (1969); Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y.) 1969), aff'd sub nom., Wyman v. Bowen, 397 U.S. 49 (1970). Free public schooling is an important benefit. Plyler v. Doe, 50 U.S.L.W. 4650 (U.S. June 15, 1982).

By discriminating against children who have been sent by their parents to live in Texas with relatives § 21.031(d) also intrudes on individual choice of family living arrangements, a freedom founded in the Constitution. Moore v. East Cleveland, 431 U.S. 494 (1977). The statute moreover,

penalizes citizen children for circumstances beyond the control of the child and which may be beyond the control of the child's parents if, for example, the parents are aliens unable to reside in Texas.

Texas has not established that any compelling state interest justifies infringing the right to travel or intruding on individual choice of family living arrangements by denying an education to the class of children affected by § 21.031(d).

Even if this Court were to find that § 21.031(d) does not infringe on the right to travel or intrude on family living arrangements, it is subject to a heightened standard of scrutiny because

the benefit withheld is access to a basic education. In order to justify a statute which has such an effect on a class of children a state must show that the statute serves a "substantial state interest". Plyler v. Doe, 50 U.S.L.W. 4650, 4657 (U.S. June 15, 1982).

Section 21.031(d) classifies the school eligibility of children living in Texas on the basis of their purpose for coming to Texas and whether or not they are living with their parents or court appointed guardian. Texas has not established that the denial of education to children in the class established by § 21.031(d) serves a substantial state interest.

Section 21.031(d) violates the

Due Process Clause of the Fourteenth Amendment because it creates an unfounded, irrebuttable presumption of non-residency. Vlandis v. Kline 412 U.S. 441 (1973).

Access to free public schooling in Texas purports to be based on residency under § 21.031 of the Texas Education Code. Section 21.031(d) creates an unfounded irrebuttable presumption of non-residency for children who live in Texas apart from their parents or a court appointed guardian if the primary purpose for their presence in Texas is to attend its free public schools. The presumption is unfounded, because whatever relevance an educational motive for coming to Texas may have as an indication of intent to abide in Texas, it does not necessarily

establish that a child's presence in Texas is intended to be temporary. It is irrebuttable because children who come to Texas for the purpose of attending its schools have no opportunity to demonstrate an intention to remain in Texas indefinitely or for such period of time as may be required on a non-discriminatory basis for children who come to Texas for other reasons.

I. SECTION 21.031(d) OF THE TEXAS EDUCATION CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Statutes Which Impinge On Fundamental Rights Are Reviewable Under A Standard Of Strict Scrutiny.

Whenever a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Zobel v. Williams, 50 U.S.L.W. 4613, 4615 (U.S. June 14, 1982). Determination of the applicable standard of scrutiny entails an assessment of the nature of the classification created by the statute and the individual and state interests affected. See Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173 (1972).

When a state statute impinges on a "fundamental" right -- i.e., a right which is either "explicitly or implicitly guaranteed by the Constitution" -- it is subject to a standard of strict scrutiny. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 34-35 (1973); Police Dept. of Chicago v. Mosely, 408 U.S. 92 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972). This standard applies whether the statute places a condition on the exercise of a fundamental right, e.g., Bullock v. Carter, 405 U.S. 134, 143 (1972) (right to vote), deters the exercise of a fundamental right, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to travel), or penalizes the exer-

cise of such a right, e.g., id.

Under this standard the state is required to show a compelling state interest justifying the impingement. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Moreover, the statute "must be drawn with precision, . . . and must be tailored to serve [the state's] legitimate objectives . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference." Dunn v. Blumstein, 405 U.S. at 343 (citations omitted).

B. Section 21.031(d) Is Subject To Strict Judicial Scrutiny Under The Compelling State Interest Standard Because It Penalizes The Exercise Of The Fundamental Right To Travel.

1. The Right To Travel Is Constitutionally Protected.

A citizen's right to travel from one state to another, which includes the "freedom to enter and abide in any state in the Union," 2/ has attained unquestioned status as a fundamental right guaranteed by the Constitution. Memorial Hospital v. Maricopa County, 415 U.S. 250, 254 (1974); Shapiro v. Thompson, 394 U.S. 618, 630 (1969); United States v. Guest, 383 U.S. 745, 757-58 (1966). Consequently, a "classification which 'operates to

2/ Dunn v. Blumstein, 405 U.S. 330, 338 (1972), quoting Oregon v. Mitchell, 400 U.S. 112, 285 (1970) (separate opinion of Brennan, White and Marshall, J.J.).

penalize those persons . . . who have exercised their constitutional right of interstate migration' must be justified by a compelling state interest." Memorial Hospital v. Maricopa County, 415 U.S. at 258 (quoting Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (separate opinion of Brennan, White, and Marshall, J.J.)).

2. Section 21.031(d) Impinges The Right To Travel Of Indigent Citizen Children By Denying An Education To Children On The Basis Of Their Purpose For Coming To Texas.

Section 21.031(d) of the Texas Education Code on its face precludes certain children from attending public free schools because they have come to Texas for the primary purpose of attending

such schools. 3/

The District Court below specifically found that:

> At least one of the legislative purposes behind Section 21.031(d) was to inhibit the migration of persons

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3/ Tex. Educ. Code Ann. § 21.031(d) (Vernon Cum. Supp. 1982) provides in pertinent part:

> In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools . . . .

Section 21.031(d) is not concerned with admission to institutions of higher learning. It is only applicable to public schools. "Residency" tests for Texas institutions of higher learning are contained in Texas Educ. Code Ann. § 54.052 (Vernon Cum. Supp. 1982).

> residing in Mexico to attend schools in the United States.

Arredondo v. Brockette 482 F. Supp. 212, 216 (1979) (f.f. 37). 4/

Texas may not attempt to deter the migration of indigents by denying them the benefits which motivate them to enter the state. Shapiro v. Thompson, 394 U.S. 618 (1969).

> [A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account.

4/ The statute inhibits the migration to Texas not only of alien children but of children who are United States citizens. Plaintiffs in the District Court proceedings below were United States citizens. 482 F. Supp. at 214, 215 (f.f. 1, 19, 20, 21).

Id. at 631. As the Shapiro Court indicated: "The purpose of inhibiting migration by needy persons into the State is constitutionally impermissible". Id. at 629.

A statute which conditions access to benefits on a person's motivation for entering the state violates the right to travel. In Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969), aff'd sub nom. Wyman v. Bowens, 397 U.S. 49 (1970) (per curiam), Judge Mansfield addressed the constitutionality of a New York statute which, like § 21.301(d) of the Texas Education Code, conditioned access to state benefits on a person's primary purpose for "entering and abiding in" the state. The statute in question created a

presumption of non-residency for all welfare applicants who had been in the state less than one year, which applicants could only overcome by establishing that their presence in the state "was not for the primary purpose" of securing the state's welfare benefits. 304 F. Supp. at 719. In holding that the statute imposed a constitutionally impermissible burden upon the right to travel, Judge Mansfield's opinion states:

> Thus both the language and the legislative history of [the statute] make it abundantly clear that its objective is to deter indigents from migrating into New York for the purpose of taking advantage of higher home relief or AFDC assistance payments available here. That objective, regardless of the statutory-form by which it is implemented (whether in terms of duration of residency, burden of proof as to

> motive, or the like) has been foreclosed by Shapiro as violative of the Equal Protection Clause. . . .
>
> * * * *
>
> In striking down state statutes that automatically render applicants for assistance ineligible for aid during the first year of residency, regardless of their motive in establishing residence, the Supreme Court did not imply that an exception might be made permitting determent of those whose sole purpose in entering the state was to obtain higher benefits.

Id. at 723 (emphasis added).

The District Court correctly concluded that "the Supreme Court has unequivocally barred a state from discouraging entry of indigents, regardless of their motive in migrating." Id. at 723.

3. Denial Of Education Is A Serious Restriction Of The Right To Travel.

The benefit deprived by

§ 21.031(d) is not some minor or inconsequential benefit indistinguishable from other benefits. See Plyler v. Doe, 50 U.S.L.W. 4650, 4655 (U.S. June 15, 1982). In holding that § 21.031 of the Texas Education Code violated the Equal Protection Clause by excluding undocumented alien children from Texas public schools, 5/ this Court in Plyler had occasion to review and strongly reaffirm the importance of education --

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5/ In considering the statute's effect on undocumented alien children, the Plyler Court pointed out that "[i]t would of course be most difficult for the state to justify a denial of education to a child enjoying an inchoate Federal permission to remain [in the State]." Id. at 4656. The plaintiffs in the instant case are American citizens, see 482 F. Supp. at 212-214 who have a citizen's right to reside in Texas.

particularly basic education -- not only to the child, but also to the nation and to the very framework of our democratic society. The Plyler Court referred to the continuing validity of the Court's earlier statement in Brown v. Board of Education, 347 U.S. 483 (1954), that:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may

> reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. 6/

6/ Starns v. Malkerson, 234 (D. Minn. 1970), aff'd 401 U.S. 985 (1971), does not suggest application of a rational basis test to § 21.031 (d). Whatever validity Starns v. Malkerson has left after Plyler and Vlandis v. Kline, 412 U.S. 441 (1973), (distinguishing Starns in fn. 9, Id. at 452, 453), Starns is plainly distinguishable from the instant case. First, in contrast to Plyler and the instant case Starns involved access to university education -- not to basic education. Secondly, the Court in Starns found that the statute in question did not have "as a specific objective . . . deterring out-of-state students from attending the University" (326 F. Supp. at 237) and that it did not have "any dire effects on the non-resident student" because it imposed only a one year waiting period on previously non-resident students (326 F. Supp. at 238). In the instant case, the District Court below found that § 21.031(d) has a specific objective to deter children from migrating to Texas to attend school and that its effect is to absolutely deprive indigent children to whom § 21.031(d) applies of an education. 482 F. Supp. at 215, 216 (f.f. 25, 37).

C. By Discriminating Against Children Who Are Sent By Their Parents To Live With Relatives, Section 21.031(d) Intrudes On The Fundamental Right To Freedom Of Choice In Family Living Arrangements

Section 21.031(d) denies an education to indigent citizen children whose parents have made arrangements for them to live with relatives in Texas so that they can attend school in Texas. Children living with close relatives such as grandparents, brothers, sisters, uncles or aunts do not qualify for an education if they have the proscribed educational purpose for coming to Texas. Children who migrate to Texas in order to attend its free public schools can do so if they live with their parents, but cannot if they live with any other relative.

Texas has argued that a living arrangement whereby a child lives with family members other than its parents is not a "natural" situation. See Reply of Respondents to Petition for Writ of Certiorari at 7. But, as this Court observed in Moore v. East Cleveland, 431 U.S. 494 (1977):

> [W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

Id. at 499.

The Court in Moore observed that freedom of personal choice in matters of marriage and family life is a long recognized liberty protected by the Due Process Clause of the Four-

teenth Amendment. Id. at 499. 7/ Moore struck down a single family zoning ordinance which defined "family" so as to exclude, under defined circumstances, grandchildren. The Court noted that "when a city undertakes such intrusive regulation of the family, . . . the usual deference to the legislature is inappropriate." Id. at 499. The Court explicitly disapproved "cutting off any protection of family rights at the first convenient,

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7/ Moore v. East Cleveland was decided on substantive due process grounds. However, this Court has recognized that governmental intrusion on the sanctity of family living arrangements can be a a denial of Equal Protection. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

if arbitrary boundary -the boundary of the nuclear family." 431 U.S. at 502. The State is "constitutionally powerless" to "inhibit the choice of related individuals to constitute a family, whether in the 'nuclear' or 'extended' form." Id. at 511 (Brennan, J., concurring).

Freedom from government intrusion into choice of family living arrangements is a right founded in the Constitution, Moore v. East Cleveland, and § 21.031(d), because it penalizes such choice, is subject to review under the strict scrutiny standard. See, supra, 13-15. In the absence of compelling state interests, a state should not be permitted to impose a penalty on

a child because its parents have arranged for the child to live with relatives.

In Moore the effect of the city ordinance was to penalize an adult (the grandmother) because her grandson lived with her, whereas in the instant case the effect of § 21.031(d) is to penalize a child if it lives in Texas with relatives other than its parents.

Section 21.031(d) penalizes children merely because their parents have decided that they should receive an education to prepare them for life as an American citizen. It penalizes children for circumstances beyond their control, which may be beyond the control of their parents and which involve no misconduct on their part or

that of their parents.

The parents of an indigent child may be aliens ineligible to reside legally in Texas or may have been deported. The parents may be unable to establish residence in Texas because they are migratory workers or for other economic, health-related or family-related reasons. Equally, indigent parents may for any number of reasons be unable to obtain a court order appointing a relative in Texas as the child's guardian.8/

8/ In Brownsville Independent School District v. Gamboa, 498 S.W.2d 448, 451 (Tex. Civ. App. 1973), a child, who was an American citizen and who had come to live with his aunt in Texas to attend school there, was

(footnote contd.)

This Court has held it improper for a state to penalize children for the conduct of their parents, even if such conduct amounts to misconduct. In Plyler v. Doe, 50 U.S.L.W. 4650 (U.S. June 15, 1982), this Court observed that § 21.031 of the Texas Education Code "imposes a lifetime of hardship on a discrete class of children not accountable for their disabling status." Id. at 4656. The Court found that to penalize a child for

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(footnote contd.)

denied admission to public school. The aunt applied to become the child's guardian, but her application was opposed by the local School Board. The guardianship application was thereupon denied.

children.

Section 21.031(d) goes beyond penalizing children for the misconduct of their parents. If a citizen child's parents are aliens not entitled to live in Texas, the effect of § 21.031(d) is to penalize the child because its parents are obeying the law by not living in Texas.

D. At A Minimum Section 21.031(d) Is Subject To Review Under The Standard Expressed In Plyler v. Doe.

Although we respectfully submit that § 21.031(d) is subject to review under the compelling state interest test because it directly penalizes exercise of the right to travel and because it penalizes a child for the living arrangements which its family has chosen for

the misconduct of its parents (illegal residence in the United States) "does not comport with the fundamental conceptions of justice." Id. at 4655.

> '[V]isiting . . . condemnation on the head of the infant' for the misdeeds of the parents is illogical, unjust and 'contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.'

Id. at 4660 (Powell, J. concurring), quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Accord Trimble v. Gordon, 430 U.S. 762 (1977), holding that a state intestacy law which excludes illegitimate children from the definition of heirs violates the Fourteenth Amendment, notwithstanding that the parents could avoid its effect by making a specific devise to such

the child, if the Court declines to apply this test it should nevertheless apply the standard ennunciated in Plyler v. Doe, 50 U.S.L.W. at 4657. Section 21.031(d), like the other subsections of § 21.031 reviewed in Plyler, deprives indigent children of an education.

The Plyler standard requires the state to establish that the statute furthers "a substantial interest of the state." Id. at 4654. The Plyler Court specifically held that other subsections of § 21.031 denying undocumented children access to Texas public schools could not be justified by a mere showing "that the classification bears some fair relationship to a legitimate public purpose." Id.

at 4654. Thus the Court precluded application of the rational basis test to the review of statutes which deny a class of children a basic public school education.

II. SECTION 21.031(d) DENIES CHILDREN DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT BY CREATING AN UNFOUNDED, IRREBUTTABLE PRESUMPTION OF NONRESIDENCY FOR CHILDREN WHO LIVE APART FROM THEIR PARENTS OR A COURT APPOINTED GUARDIAN AND WHOSE PRIMARY PURPOSE FOR LIVING IN TEXAS IS TO ATTEND PUBLIC SCHOOL.

Section 21.031 of the Texas Education Code purports to establish residency within the school district as the criterion for admissibility to public

free schools. 9/ Yet § 21.031(d) creates an irrebuttable presumption that certain children, though they live in Texas, are nonresident.

In Vlandis v. Kline, 412 U.S. 441 (1973), this Court reviewed a Connecticut statute creating of presumption of nonresidency which affected tuition rates for university students and held:

9/ The pertinent portions of § 21.031 are:

> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years . . . shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any

(footnote contd.)

> [S]ince Connecticut purports to be concerned with residency in allocating the rates of tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true and when the state has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the state allow

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(footnote contd.)

> public free school district shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent or guardian or person having lawful control reside within the school district.

> such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.

Id. at 452. 10/

The whole tenor of the Court's decision is disapproving of the creation of any irrebuttable presumption of non-residency which is not universally true.

10/ The Vlandis Court observed that Connecticut could constitutionally "establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state, but who have come there solely for educational purposes, cannot take advantage of in-state rates." Id. at 453. However, nothing in this statement implies that a student's purpose for coming to the state can be used to establish an irrebuttable presumption of non-residency. The Court merely meant to clarify that Connecticut need not classify students as residents just because they go to school in the state. Id. at 452.

Thus the Court pointed out:

> It may be that most applicants to Connecticut's university system who apply from out of state or within a year of living out of state have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of state inevitably fall in this category.

Id. at 448. See also Carrington v. Rash, 380 U.S. 89 (1965), holding a provision of the Texas Constitution violative of the Equal Protection Clause because it created an irrebuttable presumption of nonresidency which denied voting rights to those who came to Texas as members of the Armed Forces.

Vlandis v. Kline was limited in Weinberger v. Salfi, 422 U.S. 749 (1975), a case involving statutory classification in social welfare legis-

lation. However, the Vlandis holding is fully applicable to § 21.031(d) which, unlike the federal statute reviewed in Weinberger, purports to establish a test of residency and then denies the opportunity of establishing factors bearing on that issue, thereby excluding indigent children from public schools.

The circumstances on which the irrebuttable presumption created by § 21.031(d) is based do not logically preclude other conclusions than the one which is presumed. The fact that a child comes to Texas for the primary purpose of attending its public schools does not necessarily or universally mean that the intention of the child or of its parents is that such child's stay will be any less

permanent than that of a child who came to Texas for some other purpose. While it may be that parents who send their child to live in Texas so that the child can attend Texas public free schools do not intend the child to stay in Texas indefinitely, the existence of such a reason for living in Texas is not necessarily inconsistent with an intent that the child will remain in Texas for years or forever. Particularly where the child is a United States citizen, some parents may be willing to forego their child's companionship and entrust the child's upbringing to a relative to enable the child to obtain an education in the country of his citizenship.

Texas has acknowledged that

the establishment of residence under § 21.031 does not require a showing of a present intent to remain in Texas indefinitely. 11/ Mere presence in the state is sufficient if a child lives with its parents. Thus the clause in § 21.031(d) which precludes a child from establishing residence if he comes to Texas for the primary purpose of attending free public school is not even intended to relate to establishment of intent to remain in Texas on a permanent basis. But even if, as suggested by the District Court and the

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11/ In Plyler v. Doe, 50 U.S.L.W. at 4657 n.22, Texas conceded that if a Virginian or a legally admitted Mexican citizen entered a school district with his school age children, intending to remain only six months, those children would be classified as residents entitled to a free public education.

Court of Appeals below (482 F. Supp. at 219; 648 F.2d 429, 430), the purpose-based classification in § 21.031(d) were intended to distinguish between children whose presence in Texas is intended to be temporary and children whose presence is intended to be indefinite or permanent, the classification is not based on factors which establish such intent with sufficient certainty to justify an irrebuttable presumption.

The District Court below characterized the classification effected by § 21.031(d) as expressing "the ultimate universal test of residency, namely subjective intent." 482 F. Supp. at 219. This characterization confuses intent to be resident with the motive for that

intent. To the extent that there is an "ultimate universal test of residency," 12/ such test is concerned with the intent to reside permanently or indefinitely in a particular place. See, Williamson v. Osenton, 232 U.S. 619, 624, 625 (1914).

12/ Texas does not have a universal test of residency. Under § 21.031 of the Texas Education Code the residency of children living apart from their parents or legal guardian depends on whether they have the proscribed educational purpose. In contrast, the Texas Family Code provides for the purposes of venue that whenever a child is under the care and control of an adult other than his parent, and no guardian or conservator has been appointed, the child is deemed to reside where the adult having care and control of the child resides. Tex. Fam. Code Ann. § 11.04 (c)(4) (Vernon Cum. Supp. 1982). Moreover, the same statute provides that a child not under the care and control of any adult is deemed to reside where he is found. Tex. Fam. Code Ann. § 11.04 (c)(6) (Vernon Cum. Supp. 1982).

The fact that a child does or does not live with its parents and that he did or did not come to Texas in order to attend Texas public free schools may be relevant to a determination of bona fide residency, but it cannot form the basis for an irrebuttable presumption of non-residency.

III. THE INTERESTS OF THE STATE ARE INSUFFICIENT TO JUSTIFY THE STATUTE.

The state interests in defense of the classifications effected by § 21.031(d) are neither compelling nor substantial. Indeed the very internal inconsistencies between the subsections of § 21.031 and the discriminations which subsection (d) creates by depriving some children living in Texas of the free

public education available to other children confound any effort to justify its constitutionality. If the principal justification of the statute is the wish of Texas to preserve the benefits of its education for those who are genuine bona fide residents, the statute is neither fairly nor rationally tailored to serve that objective.

A. Deterrence Of Migration

At least one of the state's purposes (and apparently its principal purpose) for enacting § 21.031(d) was to deter the migration of indigent children to Texas. See Arredondo v. Brockette, 482 F. Supp. at 216 (f.f. 37).

The deterrent consists of an absolute deprivation of education to indigent children who come to Texas to attend free

public schools unless they live with their parents or a court appointed guardian. Id. at 215 (f.f. 25).

Deterrence of the migration of indigents is not a legitimate state interest; such a purpose is constitutionally impermissible. See discussion supra at 17-22.

B. Conditioning Access To School On Whether A Child Lives With A Parent Or Court Appointed Guardian

Section 21.031(d) permits children who live neither with parents nor with a court appointed guardian access to public free schools unless they have the proscribed purpose of attending such schools. The statute itself thus implicitly demonstrates the lack of any state interest in distinguishing, for

school admission purposes, between children who live with parents or a court appointed guardian and children who live in Texas with relatives. The imposition of a requirement that a child,whose parents decide that he should live in Texas so that he can attend school there, must live with a court appointed guardian to be eligible for an education, while children who come to Texas for other reasons are eligible irrespective of whom they live with, is logically unjustifiable.

C. Preservation Of Limited Financial And Physical Resources

Respondents have sought to justify § 21.031(d) by the assertion that it protects and preserves the

limited funds and physical resources available for that system, for the benefit of the State's "bona fide" residents. See Arredondo v. Brockette, 482 F. Supp. at 222. The District Court found that if § 21.031(d) were declared unconstitutional it would "in all probability" cause the immediate enrollment of thousands of citizen children from other states, countries and localities, and would require a substantial increase in the budget of school districts. 482 F. Supp. at 215 (f.f. 26, 30). 13/

13/ The supposed influx of large numbers of citizen children currently precluded from obtaining a free public education under § 21.031(d) is inconsistent with

(footnote contd.)

In response to a virtually identical argument in Plyler v. Doe, this Court observed:

> Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.

50 U.S.L.W. at 4657. Here the resources are allocated by a statute which impinges on the right to travel and on freedom of choice regarding family living arrangements, while also denying Due Process by creating an unfounded irrebuttable pre-

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(footnote contd.)

> the finding of the District Court below that only a handful of children who persisted in seeking a public free education in the McAllen Independent School District were actually denied one under that statute. See 482 F. Supp. at 216 (f.f. 38).

sumption of non-residency. The state's proffered interest in conservation of its resources cannot justify the means which it has selected to further such interest.

D. Preservation of Educational Quality

Texas has argued that an invalidation of § 21.031(d) would have a significant detrimental effect upon the quality of Texas educational standards, and the District Court below found that "in all probability" it would have such an effect. 482 F. Supp. at 216 (f.f. 34). This argument was considered and rejected in Plyler v. Doe:

> Of course, even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate

> target for exclusion. In terms of educational cost and need, however, undocumented children are 'basically indistinguishable' from legally resident alien children.

50 U.S.L.W. at 4657 (emphasis Court's own). As in Plyler, children deprived of an education by § 21.031(d) are indistinguishable from other children not deprived of an education by that section "in terms of educational cost and need."

E. Administrative Convenience

Texas has asserted, and the District Court below found, that the residency definition contained in § 21.031(d) serves the state's interests by avoiding planning difficulties associated with fluctuations in school populations and by giving administrators a statutory guideline to follow in determining bona fide

residency. 482 F. Supp. at 216 (f.f. 36). However, a concern for administrative convenience cannot justify a presumption of non-residency which ignores the intent of the child and that of its parents as to the permanency of the child's presence in Texas, and which deprives the child of an education simply because he came to Texas to get one and is not living with his parents or a court appointed guardian.

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.

Stanley v. Illinois, 405 U.S. 645, 656 (1972). See also Vlandis v. Kline, 412 U.S. 441, 451 (1973).

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be reversed, and Section 21.031(d) of the Texas Education Code should be held unconstitutional under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution.

Respectfully submitted,

Robert S. Ogden, Jr.
Counsel of Record
Kevin B. Clark
Donovan Leisure Netwon & Irvine
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Counsel For Amici Curiae

Of Counsel:
Charles S. Sims
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10006
(212) 944-9800

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Petitioner's Brief

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No. 81-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ORALIA MARTINEZ, as next friend of ROBERTO MORALES,

Petitioners,

v.

DR. M. L. BROCKETTE, as Texas Commissioner of Education; The TEXAS EDUCATION AGENCY, McALLEN INDEPENDENT SCHOOL DISTRICT; and RODNEY CATHEY, as Superintendent of McAllen Independent School District,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

JAMES A. HERRMANN
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
305 E. Jackson, Suite 206
Harlingen, Texas 78550
(512) 423-3111
Counsel Of Record For Petitioner

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
P.O. Box 2223
Hereford, Texas 79045
(806) 364-3961

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QUESTIONS PRESENTED

1. Does Texas Education Code § 21.031(d) violate the constitutional right to travel as set forth in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), by creating a motivational residency requirement of indefinite duration?

2. Did the court of appeals err in finding that Texas Education Code § 21.031(d) met strict scrutiny by finding that it served a legitimate state interest but without finding that no less restrictive alternatives were available to achieve the State's purpose?

3. Does Texas Education Code § 21.031(d), which defines a person as a non-resident solely because of his motive for establishing residence, deprive Plaintiff of his interest in public education without due process of law by creating an invalid, irrebuttable presumption of non-residence under *Vlandis* v. *Kline*, 412 U.S. 441 (1973)?

INDEX

	Page
QUESTIONS PRESENTED	i
CASES AND AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF CASE	2
ARGUMENT	9
INTRODUCTION	9
I. TEX. EDUC. CODE § 21.031(d) ABSOLUTELY DEPRIVES PLAINTIFF OF AN OPPORTUNITY TO OBTAIN AN EDUCATION	10
II. TEX. EDUC. CODE § 21.031(d) VIOLATES THE RIGHT TO TRAVEL AND IS THEREFORE UNCONSTITUTIONAL	14
A. The Purpose Of Section 21.031(d) Is To Deter Migration	14
B. Deterring Migration Is An Impermissible State Purpose	18
C. Deterring Migration Based On Motive Is Also Impermissible	19
D. College Tuition Cases Are Distinguishable From This Case	24
III. TEX. EDUC. CODE § 21.031(d) DENIES PLAINTIFF EQUAL PROTECTION OF THE LAWS	26
A. Strict Scrutiny Should Be Applied To The Statute Or Alternately Heightened Scrutiny Should Be Applied	27
B. Tex. Educ. Code § 21.031(d) Does Not Pass Either Strict Scrutiny Or Heightened Scrutiny And Therefore Denies Plaintiff Equal Protection Of The Law	29
1. Tex. Educ. Code § 21.031(d) Is Not Substantially Related To The State's Interest In Defining Residence	31

Table of Contents Continued

Page

2. Excluding Plaintiff From School Is Not Substantially Related To The State's Interest In Protecting The Finances And Quality Of Its Public Schools 38

3. Intra-State Transfer And Planning Problems Do Not Justify Section 21.031(d) .. 42

a. Fraudulent transfers 43

b. Migration to more attractive districts 43

c. Athletic transfers 44

d. School desegregation 45

IV. TEX. EDUC. CODE § 21.031(d) CREATES AN INVALID IRREBUTTABLE PRESUMPTION OF NON-RESIDENCE AND THEREFORE DENIES PLAINTIFF HIS INTEREST IN PUBLIC SCHOOLING WITHOUT DUE PROCESS OF LAW 46

CONCLUSION 49

TABLE OF CASES AND AUTHORITIES

CASES: Page

ABC League v. *Mo. State High School Activities Ass'n.*, 530 F. Supp. 1033 (E.D.Mo. 1981) 45

Ambach v. *Norwick*, 441 U.S. 68 (1979) 10

Andre v. *Bd. of Trustees of Maywood*, 561 F.2d 48 (7th Cir. 1977) cert. den. 434 U.S. 1013 (1978) 26

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) ... 22

Arredondo v. *Brockette*, 482 F. Supp. 212 (S.D.Tex. 1979) 1

Arredondo v. *Brockette*, 684 F.2d 425 (5th Cir. 1981) . 1

Baldwin v. *G.A.F. Sellig*, 294 U.S. 511 (1935) 22

Bell v. *Burson*, 402 U.S. 535 (1971) 48

Belle Terre v. *Boraas*, 416 U.S. 1 (1971) 26

Bright v. *Baesler*, 336 F. Supp. 527 (E.D.Ky. 1971) .. 26

Brown v. *Board of Education*, 347 U.S. 483 (1954) ... 25

Brownsville Independent Sch. Dist v. *Gamboa*, 498 S.W.2d 448 (Tex.Civ.App. 1973) 13, 15

Corfield v. *Coryell*, 6 F.Cas. 546 (CCED Pa. 1825) ... 18

Craig v. *Boren*, 429 U.S. 190 (1976) 29

Denis O'Connell High School v. *Virginia High School League*, 581 F.2d 81 (4th Cir. 1978) 45

Dept. of Agriculture v. *Moreno*, 413 U.S. 528 (1973) .. 23

Doe v. *Plyler*, 458 F. Supp. 569 (E.D.Tex. 1978) 14, 15, 44

Dunn v. *Blumstein*, 405 U.S. 330 (1972) ..... *passim*

Edwards v. *California*, 314 U.S. 160 (1941) 6, 18, 22

Elkins v. *Moreno*, 435 U.S. 647 (1978) 46, 47, 48

Examining Board v. *Flores de Otero*, 426 U.S. 572 (1976) 16

Gaddis v. *Wyman*, 304 F. Supp. 717 (S.D.N.Y. 1969) 7, 20, 22

Griffin v. *County School Board of Prince Edward Co.*, 377 U.S. 218 (1964) 7, 27

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 23

Hicklin v. *Orbeck*, 437 U.S. 518 (1978) 22

Hirabayashi v. *United States*, 320 U.S. 81 (1943) 27

Table of Authorities Continued

Page

Hunter v. *Erickson*, 393 U.S. 385 (1969) 28

In re Alien School Children, 501 F. Supp. 544 (S.D.Tex. 1980) 14, 46

In re Henson, 551 S.W.2d 136 (Tex. Cir. App. 1977) . 13

McCarthy v. *Philadelphia Civil Service Comm.*, 424 U.S. 645 (1976) 26

Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974) ..... *passim*

Moore v. *City of East Cleveland*, 431 U.S. 494 (1977) 7, 23, 24, 28

Morris v. *Gilmer*, 129 U.S. 315 (1889) 21

Passenger Cases, 7 How 283 (1849) 18

Paul v. *Virginia*, 8 Wall 168 (1869) 22

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) . 23, 24, 28

Plyler v. *Doe*, 457 U.S. ____, 50 U.S.L.W. 4650 (1982) ..... *passim*

Ramey v. *Rockefeller*, 348 F. Supp. 780 (E.D.N.Y. 1972) 26, 34

Reed v. *Reed*, 404 U.S. 71 (1971) 13

Reitman v. *Mulkey*, 387 U.S. 369 (1967) 28

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 36, 39

Roe v. *Wade*, 410 U.S. 113 (1973) 23

San Antonio School District v. *Rodriguez*, 411 U.S. 1 (1973) 44

Schneider v. *Rusk*, 377 U.S. 163 (1964) 29

Shapiro v. *Thompson*, 394 U.S. 618 (1969) ..... *passim*

Shivelhood v. *Davis*, 336 F. Supp. 1111 (D.Vt. 1971) . 26

Slaughter-House Cases, 16 Wall 36 (1873) 18

Spriggs v. *Altheimer, Ark. School District #22*, 385 F.2d 254 (8th Cir. 1967) 45

Stanley v. *Illinois*, 405 U.S. 645 (1972) 48

Starns v. *Malkerson*, 326 F. Supp. 234 (D.Minn. 1970) (aff'd) 401 U.S. 985 (1971) 24

Table of Authorities Continued

Page

Sturgis v. *Washington*, 368 F. Supp. 38 (W.D.Wash. 1973) (aff'd) 414 U.S. 1057 (1973) 24

Sullivan v. *University Interscholastic League*, 616 S.W.2d 170 (Tex. 1981) 45

Taylor v. *Louisiana*, 419 U.S. 522 (1975) 13

Toll v. *Moreno*, 441 U.S. 458 (1979) 47

Toll v. *Moreno*, 458 U.S. 1, 50 U.S.L.W. 4880 (1982) . 47

Trimble v. *Gordon*, 430 U.S. 762 (1977) 13, 29, 42

U.S. v. *Guest*, 383 U.S. 745 (1966) 18

U.S. v. *Gypssum*, 333 U.S. 364 (1948) 34

Valenciano v. *Bateman*, 323 F. Supp. 600 (D.Az. 1971) 42

Vlandis v. *Kline*, 412 U.S. 441 (1973) 8, 46, 48

Walsh v. *Louisiana High School Athletic Ass'n.*, 428 F. Supp. 1261 (E.D.La. 1977) 45

Weber v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) 29

Weinberger v. *Salfi*, 422 U.S. 749 (1975) 8, 46

Whatley v. *Clark*, 482 F.2d 1230 (5th Cir. 1973) 26

Williamson v. *Osenton*, 232 U.S. 619 (1914) 8, 21, 33

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 7, 11, 23, 24

Wright v. *City of Jackson, Miss.*, 506 F.2d 900 (5th Cir. 1975) 26

Wyman v. *Bowens*, 397 U.S. 49 (1970) 7, 20

Zobel v. *Williams*, 457 U.S. ___, 50 U.S.L.W. 4613 (1982) 18, 20, 21

ARTICLES

Immigration Law and Rural Poverty—The Problems of the Illegal Entrant, 1969 Duke L.J. (1969) 22

Texas Advisory Committee to the United States Commission on Civil Rights, *Sin Papeles: The Undocumented in Texas* (1980) 11

STATUTES

Colo. Rev. Stat. § 22-1-102(2) (1974) 37

Table of Authorities Continued

	Page
Conn. Gen. Stat. § 10-253(d) (1982 Cum Supp.)	37
Kan. Stat. Ann. § 72-1046 (1980)	37
N.J. Stat. Ann. § 18A:36-1(b) (West Cum. Supp. 1981)	38
N.Y. Educ. Law § 3202 4(b) (McKinney 1981)	37
Pa. Cons. Stat. Ann. § 13-1302 (Purdon Cum. Supp. 1981)	38
U.S. Const. Art. I, § 8, cl.4	16
U.S. Const. Art. VI, cl.2	16
34 C.F.R. § 204.3(d)(5)	37
24 C.F.R. § 300.10	37
Tex. Const. Art. VII § 1 (Vernon Cum. Supp. 1981)	2
Tex. Ed. Code § 21.031 (Vernon Cum. Supp. 1981)	*passim*
Tex. Ed. Code § 21.032	25
Tex. Ed. Code §§ 21-061 — 21-081	42
Tex. Fam. Code § 11.04 & Ch. 33, 35, & 51-52	10
Tex. Fam. Code § 51.02(4)	3
Tex. Fam. Code § 51.03	25
Tex. Prob. Code § 112	25
Tex. Prob. Code § 113	13
Tex. Prob. Code § 193	13
7 U.S.C. § 2012(i)	37
8 U.S.C. § 1101 *et seq.*	16
8 U.S.C. §§ 1151-1154	16
20 U.S.C. § 238	37
20 U.S.C. § 244(3)	37
20 U.S.C. § 1401 *et seq.*	36
20 U.S.C. § 1412(b)	37
20 U.S.C. § 2701 *et seq.*	37
20 U.S.C. § 2854(11)	37
28 U.S.C. § 1254(1)	1
42 U.S.C. § 606(a)	37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-857

ORALIA MARTINEZ, as next friend
of ROBERTO MORALES,

Petitioners,

v.

DR. M. L. BROCKETTE, as Texas Commissioner
of Education; The TEXAS EDUCATION AGENCY,
McALLEN INDEPENDENT SCHOOL DISTRICT;
and RODNEY CATHEY, as Superintendent of
McAllen Independent School District,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (A.43a) is reported at 648 F.2d 425. The opinion of the district court (A.21a) is reported at 482 F. Supp. 212.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1981. A petition for rehearing and suggestion for rehearing en banc were denied on August 13, 1981. The petition for writ of certiorari was filed on November 7, 1981, within 90 days of the denial of rehearing. Certiorari was granted on June 21, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

TEXAS EDUCATION CODE ANN., TITLE 2

SECTION 21.031 (Vernon Cum. Supp. 1981)

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or other person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens or legally admitted aliens and who are over five and under 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

(d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools.

. . .

STATEMENT OF THE CASE

The Texas Constitution, Article VII, § 1, establishes a system of "public free schools" in Texas. Admission to the public

schools is governed by Tex. Educ. Code § 21.031 (Vernon Cum. Supp. 1981). That statute sets forth two criteria for school admission: (1) that a child be between the ages of five and twenty-one and (2) that he or his parent, guardian, or other person having lawful control of him be a resident of a Texas school district.[1] Tex. Educ. Code § 21.031(b).

Texas Educ. Code § 21.031 applies two different standards of residence depending upon the living arrangement of the school applicant. If a child lives with his parents or guardian, his residence is determined without questioning his motive for living in the district. If a child lives with a sister, grandparent, or other custodian,[2] he has the burden of proving he is not living in the district for the primary purpose of attending school. A child who fails to meet that burden is defined by Tex. Educ. Code § 21.031(d) as a "non-resident" of the district where he lives and is denied tuition-free admission to the public schools.

Thus, Section 21.031(d) creates a motivational residency requirement applicable only to children who do not live with a parent or guardian. A child who is privileged to live with his parents may choose his school district for any reason. A child who is not so privileged is required to justify the reason for his presence in a school district. Of the infinite variety of reasons which may cause a child to live in a school district apart from his parents or guardian, only one motive—the desire for an education—is singled out as constituting dispositive proof of non-residence, without regard to all other indicia of residence.

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[1] A third criteria, that the child be a citizen or lawfully admitted alien was recently found unconstitutional in *Plyer* v. *Doe*, 457 U.S. ——, 50 U.S.L.W. 4650 (1982).

[2] "Custodian" is used in this brief to refer to a person having lawful control of a child but not pursuant to a court order. The Texas Family Code defines a "custodian" as "the adult [other than a parent or guardian] with whom the child resides." Tex.Fam.Code § 51.02(4). The word "guardian" is used in this brief to include both guardians and persons having lawful control of a child pursuant to a court order.

Petitioner Roberto Morales is a United States citizen, born in McAllen, Texas, on August 16, 1969. His parents are Mexican citizens who reside in Reynosa, Mexico. [*Plf. Exh.* 8-96, 8-1093, T. 45-47].[3] In 1977, when he was eight years old, it was decided that it would be in Roberto's best interests to return to McAllen to attend school and to learn to speak English. Therefore, he move from his parents' home in Mexico to reside in McAllen, Texas, with his married sister, Petitioner Oralia Martinez. In the fall of 1977, Roberto applied for admission to the McAllen school district. [*Plf. Exh.* 1, A.54a]. He was denied admission pursuant to Tex.Educ.Code § 21.031(d), and appealed to the McAllen school board. The board upheld the decision of its staff to deny Roberto admission upon its findings that Roberto (1) was not living with his parent or court-appointed guardian and (2) had moved to McAllen for the primary purpose of attending school. [*Plf. Exh.* 8-96, 97; *Plf. Exh.* 2, A.57a]. Because both Roberto and his sister are indigent, they were unable to afford the tuition payments required of non-resident students. Therefore, Roberto was unable to attend school during the 1977-1978 school year. [FF. 11, 12; A.23a]. Roberto, nevertheless, remained in McAllen with his sister and her husband during 1977-1978, and has continuously resided in McAllen since that time. [FF. 9, A.23a]. In order to enter school in the fall of 1978, Roberto paid tuition to the McAllen school district. [FF. 13, A.23a]. He seeks reimbursement of that tuition payment as damages in this action. Since January, 1979, Roberto has attended school pursuant to an injunction pending appeal entered by the district court [A.2a].

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[3] Throughout this brief plaintiffs will use the following abbreviations: Joint Appendix as "A."; Record on Appeal as "R."; Transcript of Trial as "T."; Plaintiffs' Exhibits as "*Plf. Exh.*"; Defendants' Exhibits as "*Def. Exh.*"; and findings of fact of the district court as "FF." Plaintiff's Exhibits 1-7 were admitted into evidence at R. 71. Plaintiff's Exhibit 8 was admitted into evidence at T. 45-47. Defendants' Exhibits 1-6 were admitted into evidence at R. 72.

On December 16, 1977, Roberto Morales, Oralia Martinez, as his next friend, and five other students in similar circumstances filed this action in the Southern District of Texas [R. 1]. The suit was originally brought against the Defendant McAllen Independent School District and the Texas Education Agency, as well as against three other school districts which are no longer parties to the litigation.[1] The Plaintiffs challenged the constitutionality of Tex.Educ.Code § 21.031(d) on its face, alleging that the statute creates a motivational residency requirement which infringes their fundamental right to travel, and that it imposes an irrebuttable presumption of non-residence which denies them public education without due process of law.

The district court consolidated a motion for a preliminary injunction with the trial on the merits and entered final judgment for Defendants on December 19, 1979. [A.41a, R.136]. The district court found that, with the exception of his motive, Roberto Morales met fully the school residence standard applied to children admitted to school [FF. 7, A.22a], and that the statute absolutely deprived indigent children of an education. [FF. 25, A.25a]. The district court also found that one of the purposes of Section 21.031(d) was to inhibit the migration of persons from Mexico to Texas to attend school in the United States [FF. A.27a]. Nevertheless, the court held that because the statute imposed a motivational rather than a durational residency requirement it did not burden Plaintiff's right to travel. [A.29a-32a]. The court applied a "rational basis" stand-

[1] The other plaintiff children are no longer parties to this suit for various reasons: they were admitted to school, withdrew from the school district, or presented no evidence in support of their claims. At trial Plaintiffs voluntarily dismissed all of the Defendant school districts and their superintendents with the exception of McAllen and Pharr-San Juan-Alamo [F.F. 20-23, A. 24a-25a]. After the decision of the court of appeals, Plaintiffs Rita Gomez, and her next friend Flora Falcon, chose not to join in the petition for certiorari. For that reason, Pharr-San Juan-Alamo School District, where Rita was enrolled, was not named as an interested party in the petition for certiorari.

ard of review and found that the statute had some rational relationship to certain State interests. The court also found the presumption that children who moved for the purpose of attending school were non-residents was necessarily and universally true and therefore did not deny due process. [A.34a]. The judgment was affirmed by the court of appeals on June 19, 1981. This court issued its writ of certiorari on June 21, 1982.

SUMMARY OF ARGUMENT

I. Texas Education Code § 21.031(d) absolutely deprives children of an education if they live with custodians and have established their homes in Texas for the primary purpose of attending school. This deprivation is particularly acute for United States citizen children of Mexican national parents because the statute deprives them of the opportunity to obtain an education in the United States. The only way such children may obtain the education they need to participate fully in American society is to migrate to the United States to live with relatives or friends. Without an education these citizens are condemned to a permanent status of second-class citizenship.

II. Section 21.031(d) was enacted for the specific purpose of deterring United States citizens from migrating to Texas from Mexico. Texas school administrators demanded that the State take steps to impede an "influx" of these "Mexican" migrants *lawfully* establishing residence in Texas, in order to ease the financial problems of the school districts. However, it is impermissible for the State to solve alleged budgetary and administrative problems by attempting to deter or penalize the lawful migration of United States citizens. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Edwards* v. *California*, 314 U.S. 160 (1941).

It is also impermissible for a State to attempt to deter or penalize those who migrate because they want to obtain an education. Plaintiff's right to travel and to establish a home in Texas is unconditional. *Dunn* v. *Blumstein*, 405 U.S. 330, 341 (1972). A State may no more seek to fence out those who migrate for a particular purpose than it may fence out migrants

generally. *Shapiro*, 394 U.S. at 334; *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D.N.Y. 1969), aff'd. *sub nom. Wyman* v. *Bowens*, 397 U.S. 49 (1970). Neither may a State place special burdens on those who migrate to live with custodians rather than with parents or legal guardians. Such action compounds an impermissible deterrance and penalty on travel by interfering with the right of family privacy. See *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977). Texas' desire to ease budgetary problems does not justify interference with Plaintiff's right to live with his sister if his family feels that it is in his best interests to do so. Because the statute was enacted for the specific purpose of deterring and penalizing travel it is unconstitutional on its face.

III. The statute also denies Plaintiff equal protection of the laws. On its face the statute discriminates against one class of children—those who have established homes with custodians for the purpose of attending school—and denies them free public schooling made available to all other children in the State. Strict constitutional scrutiny must be applied to the State's justification for this discrimination for three independent reasons. First, the statute has the purpose and effect of penalizing travel. *Shapiro*, 394 U.S. at 634. Second, the statute was enacted for the ethnically motivated purpose of preventing children of Mexican national origin from enrolling in Texas schools. *Griffin* v. *County School Board of Prince Edward Co.*, 377 U.S. 218 (1964). Third, the statute impermissibly interferes with Plaintiff's right to family privacy. *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-234 (1972). If strict scrutiny is not applied, then heightened scrutiny should be applied because the statute deprives Plaintiff of an education. *Plyler* v. *Doe*, 457 U.S. ____, 50 U.S.L.W. 4650 (1982).

The district court held that the 1977 amendment satisfied equal protection because the statute was rationally related to two State interests: (1) establishing a guideline for determining residence, and (2) protecting the finances and quality of the public schools. Applying either standard of scrutiny to these interests, the statute violates equal protection. The statute

cannot pass strict scrutiny because it is not narrowly drawn to achieve compelling state interests. Reasonable, less restrictive means of determining whether a child resides in a school district are available.

The statute also fails to pass heightened scrutiny. Section 21.031(d) is not a definition of residence; rather, it is a distinct and independent requirement of proper motive. Defendants' claim that motive proves lack of sufficient permanence to be a resident is of no relevance because Texas requires no degree of permanence to establish school residence. Even if it did, the desire to obtain a state benefit is consistent with an intent to remain and may not constitutionally be considered in determining residence. *Shapiro* v. *Thompson*, 394 U.S. 618, 631-632; *Williamson* v. *Osenton*, 232 U.S. 619, 625 (1914). Therefore, Section 21.031(d) is not a definition of residence, but a requirement of proper motive. The State may not justify the imposition of a special eligibility requirement on only one class of children by labelling it a definition of residence. *Plyler* v. *Doe*, 457 U.S. ____, n.22, 50 U.S.L.W. 4650, 4656-4657 (1982).

Neither is the motive requirement in Section 21.031(d) substantially related to the State's interests in protecting the quality of its schools. Plaintiff's desire to attend school, *vel non*, does not provide a basis for discriminating against him. *Shapiro*, 394 U.S. at 631-632. The State has shown no other reason why Plaintiff should be the one to sacrifice his education to preserve the quality of Texas schools. Defendants have offered no evidence to show that Section 21.031(d) protects the schools from the other administrative and planning problems mentioned by Defendants except through the impermissible means of deterring and penalizing migration. *Shapiro* v. *Thompson*, 394 U.S. 618, 632-633 (1969).

IV. Tex.Educ.Code § 21.031(d) creates an invalid irrebuttable presumption of non-residence which deprives Plaintiff of his interest in free public education without due process of law under this Court's holding in *Vlandis* v. *Kline*, 412 U.S. 441 (1973), as limited by *Weinberger* v. *Salfi*, 422 U.S. 749

(1975). Where a State's paramount concern in distributing benefits is with residence, the State cannot deny an individual the opportunity to prove his residence by resorting to a conclusive presumption of non-residence which is not universally true. Texas makes residence the paramount concern in order to qualify for public school. Section 21.031(d) conclusively presumes that a child who lives with a custodian necessarily lacks the intent to remain to be a resident if he moved to the district for the purpose of attending school. That presumption is invalid because Texas does not generally require intent to remain in order to establish school residence. Even if it did, the desire to obtain a State benefit is consistent with an intent to remain and establish a home. Plaintiff established such a home five years ago. Because the consequences of denying children an education are so grave, and reasonable alternatives are available, the use of an arbitrary presumption to determine Plaintiff's residence does not comport with due process.

ARGUMENT

Introduction

Roberto Morales' efforts to obtain an education in the country of his birth presents the Court with the second of Texas' attempts to close its schools to children described loosely by Defendants as "Mexicans." The 1975 amendments to the school admissions statute effectively eliminated undocumented alien students from the schools, Tex. Educ. Code § 21.031(a)-(c), an action that this Court found to deny that class of "Mexican" children the equal protection of law. *Plyler* v. *Doe*, 457 U.S. ____, 50 U.S.L.W. 4650 (1982). In 1977, Texas sought to eliminate another group of "Mexican" students from its schools—those who were United States citizens lawfully residing in the country, but whose parents were residing in Mexico. The exclusionary device chosen by the legislature was to define that class of children as non-residents if they were living in Texas apart from their parents or guardians for the "primary purpose" of attending school. Tex. Educ. Code § 21.031(d).

The question presented by this case is whether Texas may deny a public education to citizens, particularly those of Mex-

ican national parents, who have established homes in the State with custodians, merely because their motive for living in Texas is to attend school.[5]

I. TEX. EDUC. CODE § 21.031(d) ABSOLUTELY DEPRIVES PLAINTIFF OF AN OPPORTUNITY TO OBTAIN AN EDUCATION

By defining Roberto Morales as a non-resident of McAllen, Tex.Educ.Code § 21.031(d) excludes him from the public schools. Because he is indigent and cannot afford to pay tuition, exclusion from public school absolutely deprives him of an education. [FF.25, A.25a]. But Section 21.031(d) does more than deprive Plaintiff of an education. It effectively deprives him of his citizenship.

Education is the primary vehicle by which we transmit "the values on which our society rests," *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979), and "prepare citizens to participate effectively and intelligently in our open political system," *Wis-*

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[5] This case does not involve the right of transients to receive an education, nor does it involve the right of children to commute from a home in one district to attend school in another district. The Plaintiff has established his only home in the McAllen school district. Finally, this case does not raise the question of whether a State may, out of concern for the health and safety of a child, require that he live with a parent or court-ordered guardian. Texas has specifically recognized and approved of children living with custodians. The Texas Family Code assumes that children may live with custodians and gives custodians ample authority to consent to necessary medical treatment for the child and to act on behalf of the child in legal matters involving the child. See generally, Tex.Fam.Code § 11.04 and Chs. 35, and 51-54. The Texas school admissions statute allows children living with custodians to establish school residence in the district where the custodian lives and attend school free of charge. Tex.Educ.Code § 21.031(b). Texas' claim in their *Reply to the Pet. for Cert.*, at 4, that § 21.031(d) is necessary to assure that there is a responsible adult to give permission for field trips and sports activities is spurious. Children with custodians are admitted to school under Section 21.031(d) as long as they do not have the prohibited motive.

consin v. *Yoder*, 406 U.S. 205, 221 (1972). Although indispensable for all citizens, a public education is particularly vital for the United States citizen children of Mexican national parents. Public education may be the only way these children can acquire the values and skills necessary to exercise their citizenship. To obtain that education, these citizen children must leave their parents' homes in Mexico and move to the United States to live with relatives or friends. When that decision is made, Section 21.031(d) defines these citizens as non-residents, and thereby deprives them of the opportunity for an education.

Thus Section 21.031(d) is creating a growing underclass of United States citizens, citizens free to live within the United States, but for want of skills as basic as the ability to speak English, condemned to the same shadow world of second class status as the undocumented alien children in *Plyler* v. *Doe*, 457 U.S. ____, 50 U.S.L.W. 4650 (1982). Unlike undocumented aliens, theirs is not just second class status, but second class citizenship. This is a tragedy of national proportions. As the administrative officer of a San Antonio school district testified about children excluded from school by Section 21.031(d):

> it is a painful experience for us to turn away children who apparently are going to be residents in our community from now on and due to the nature of the law, we cannot educate . . .
>
> * * *
>
> All I can say is that it is a real hardship on these children and I see a real dim future for them because if they don't get an education they will probably end up as welfare cases or whatever, charities of the public.

Sin Papeles, The Undocumented in Texas, A Report of the Texas Advisory Committee to the United States Commission On Civil Rights, at p. 37 (Jan. 1980).

Section 21.031(d) was specifically designed to keep the citizen children of Mexican parents from coming to Texas to attend school. *Infra*, pp. 14-17. However, they are not the only

ones whose opportunity to obtain an education is made "more difficult" by Section 21.031(d). *Plf. Exh.* 6 [A.59a,]. Indigent children from Houston or Idaho may have educational reasons for moving to McAllen as pressing as those of Plaintiff. Discipline or personal problems may make it difficult for a child to stay in school where his parents live, prompting him to move in the hope he can better adjust to school in another locale.[6] Parents whose work requires them to move frequently from place to place, such as migrant farm workers, may well have to send their children to live with a friend or relative for the primary purpose of having the children attend school in the district where the relative or friend lives. The move to attend school is as much in the best interests of these children as it is in the best interests of citizen children whose parents live in Mexico.

There is no merit to Defendants' claim that Section 21.031(d) does not deprive children of an education because they can pay tuition, obtain a guardianship, or move elsewhere. Tuition is clearly beyond the reach of the indigent. Nor is there is anything in the statute which requires the schools to admit tuition students even if they can pay. The tuition requirement is identical to that applied to undocumented aliens, which this Court considered to have an exclusionary effect. *Plyler*, 457 U.S. ____, 50 U.S.L.W. 4650. Court-ordered guardianships

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[6] See e.g., *Plf. Exh.* 8-1035 (Application for Dalia Cantu, 10-12-78) (Child, 15, living with Aunt, "Dalia did not want to go to school in Chicago and is not attending school this year at all. When Mrs. Zuniga [the child's aunt] visited the Cantu's she saw that Dalia wasn't attending school at all so decided to bring her to McAllen and enroll her here"—admission denied); *Plf. Exh.* 8-815 (Application for Norma Bazan, 8-30-78) (Child, 15, "Parents are divorced. Norma does not get along with her mother. Problems arose in family so she came to live with Mr. & Mrs. Pena (cousin of Mr. Pena). They have counseled Norma and Norma is willing to go to school"—admission denied); 8-935 (Application for Manuel Garcia, 9-28-78) (Child, 16, "Parents plan to move to McAllen so decided to send Manuel to live with the Gonzalez's [family friends] so that he can start school now instead of making the transfer in the middle of the year. Manuel has not been in school this year at all"—admission denied).

may be even more expensive to obtain than paying tuition, and involve a serious intrusion into the parent-child relationship.[7]

Defendants' suggestion that these children return to where they came from to obtain an education may not be possible,[8] and, more importantly, such a suggestion impermissibly requires a child to choose between an education and his fundamental c nstitutional right to travel to and to establish a home in the United States.

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[7] Court-ordered guardianships require an attorney and may involve expensive contested court hearings. For example, in *Brownsville Ind. Sch. Dist.* v. *Gamboa*, 498 S.W.2d 448, 451 (Tex.Civ.App. 1973), the school district contested an aunt's application for guardianship of her niece pursuant to Tex. Prob. Code § 113, which gives "any person" the right to contest a guardianship. Guardians are also required to post a bond with the court as part of the guardianship proceedings. Tex. Prob. Code § 193. More than the expense, parents may fear that a court-ordered guardianship will have unforeseen consequences for their parent-child relationship in the future. See, *Plf. Exh.* 8-172 (Application for Kristy Borgne, 8-15-78). Texas courts have held that the powers of a guardian are the same as those of a managing conservator. *In re Henson*, 551 S.W.2d 136 (Tex.Civ.App. 1977). Thus, by agreeing to a court-ordered guardianship, parents may be relinquishing permanent custody of their children. Most important, an otherwise unconstitutional state statute cannot be salvaged because the statute provides an "escape hatch" for some people, conditioned on their taking unusual affirmative action not required of others, *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Reed* v. *Reed*, 404 U.S. 71 (1971), much less an "escape hatch" which is illusory for a child because an adult refuses to take the necessary action for him. *Trimble* v. *Gordon*, 430 U.S. 762, 773-774 (1977); *cf. Plyler*, 457 U.S. __, 50 U.S.L.W. at 4655. Defendants' claim that Section 21.031(d) prevents thousands of children from enrolling in school concedes that the Defendants do not believe that obtaining a guardianship is an alternative for many children.

[8] Section 21.031(d) may strip a child of his residence even though he has been living in McAllen all of his life and has nowhere to "return to." For example, a citizen child could reside in McAllen with his undocumented parents, but, if his parents are deported and he remains in McAllen in order to complete his schooling, he becomes excludable under section 21.031(d) without his having moved or

II. TEX. EDUC. CODE § 21.031(d) VIOLATES THE RIGHT TO TRAVEL AND IS THEREFORE UNCONSTITUTIONAL

A. The Purpose Of Section 21.031(d) Is To Deter Migration

Of course, the Defendants do not want, nor do they expect, Plaintiff or other citizen children from Mexico to qualify for school by paying tuition or obtaining guardianships. The purpose of Section 21.031(d) is to protect the finances and quality of the Texas public schools by preventing children of Mexican parents from moving to Texas, establishing a home, and attending school. *Reply to Petition for Cert.*, at 3-4, 8-9. The district court found this was one of the purposes for the statute [FF.37, A.27a], and the history of the enactment of Section 21.031(d) demonstrates that the sole purpose for the enactment of the statute was to deter the migration of citizen children from Mexico.

For several years the State of Texas has been concerned with the increasing numbers of immigrants from Mexico who settle in the State and the impact they have upon the quality and finances of the Texas public schools. *Doe* v. *Plyler*, 458 F. Supp. 569, 575-576 (E.D.Tex. 1978); *In re Alien School Children*, 501 F. Supp. 544, 574-579 (S.D.Tex. 1980), aff'd. *sub nom. Plyler* v. *Doe*, 457 U.S. ____, 50 U.S.L.W. 4650 (1982). On the assumption that the current system of financing the public schools could no longer support the increasing number of students applying to the schools, the State acted to bar Mexican children from the schools. First, in 1975, the State amended Section 21.031 to exclude undocumented alien students from the Texas public schools. Tex. Educ. Code § 21.031. *Plyler* v. *Doe*, 457 U.S. at ____, 50 U.S.L.W. at 4651.

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changed his motive in any way. See, e.g., *Plf. Exh.* 8-346 (Application of Rebecca Aguilar, 8-22-78) (Child, 15, born in McAllen, lives with brother. "Rebecca attended McAllen schools prior to parent's divorce. Parents have since moved to different areas. Rebecca has done very well in school here and would like to continue attending McAllen schools."—admission denied).

Having excluded unlawful migrants, the State next turned its attention to children of Mexican origin *lawfully* establishing residence in the United States. In July, 1975, the State Board of Education commissioned the *Mexican Immigrant-Alien Student Study, 1975-1976*, to examine the impact such lawful migrants have on Texas school districts. *Def. Exh.* 3, at 120-121, 148; *Doe* v. *Plyler*, 458 F. Supp. at 576.[9] It was the position of Texas school administrators that the problems of overcrowding and insufficient finances in the school districts along the border resulted, in part, from the fact that too many Mexicans were being allowed to establish lawful residence in Texas. *Def. Exh.* 3 at pp. 16-28. As Defendant Rodney Cathey, superintendent of the McAllen school district put it:

> . . . there appears to be little impediment to Mexican nationals obtaining legal residency in the border school districts. If the parents cannot, or do not, obtain legal residence in the United States, the laws of the State as supported by *Gamboa* v. *Brownsville Independent School District*,[10] make it possible for literally thousands of Mexican children to meet at least one of the four criteria for attendence in a Texas school when the uncles, aunts, grandparents, sisters, brothers, cousins, etc., of Mexican children have legal residence in the various Texas border communities and thus can and do provide guardianships, lawful control, or residence for any Mexican child desiring to attend school on the north, rather than the south, side of the border.

Def. Exh. 3 at 20.

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[9] The questionaires on which the Immigrant-Alien Study were based limited the study to the impact of children born in Mexico. *Def. Exh.* 3, p. 118. The study was also limited to the impact of children who had lawfully migrated to the State. *Def. Exh.* 3, p. 148. Nevertheless, the State relied on the study to demonstrate the impact of undocumented alien children on the schools. *Doe* v. *Plyler*, 458 F.Supp. 569, 576 (1978). This is symptomatic of the undifferentiated attitude of the schools and the State of Texas that children of Hispanic descent are all "Mexicans" who pose problems for the schools whether they are permanent resident aliens, undocumented aliens or United States citizens.

[10] The *Gamboa* case, 498 S.W.2d 448 (Tex.Civ.App. 1973), was brought by citizen children, like Plaintiff, who had migrated from Mexico to reside with relatives in the United States.

The irony of Defendant Cathey's remarks is that the "Mexican" children to whom he refers are United States citizens; Plaintiff, the children in the *Gamboa* case, and all the children from Mexico excluded from the McAllen school district pursuant to § 21.031(d) are United States citizens. *Plf. Exh.* 8[11]; 498 S.W.2d at 449.[12] Such children are United States citizens because they were born in the United States when their Mexican parents were present here pursuant to a visa or illegally.[13]

Texas' *Mexican Immigrant-Alien Student Study; 1975-1976* made several recommendations directed at these "Mexican" children. A key recommendation was to restrict the definition of resident for purposes of school admission so as to prevent

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[11] The applications of the citizens excluded (other than Plaintiff) appear at *Plf. Exh.* 8-46; 8-425; 8-441; 8-446; 8-447; 8-494; 8-566; 8-590; 8-740; 8-749; 8-829.

[12] Federal immigration laws make it virtually impossible for an alien child to obtain a permanent resident visa apart from his parents. See, generally, the Immigration and Nationality Act, 8 U.S.C. §§ 1151-1154. Lawfully admitted parents and adult United States citizen brothers or sisters can apply for an alien child's visa. 8 U.S.C. § 1153(a)(5). Even where the required sibling relationship exists, the alien child's parents could be immigrated before the child as immediate relatives of a United States citizen. 8 U.S.C. § 1151(b).

[13] Even if the children migrating from Mexico were lawfully admitted aliens, *Def. Exh.* 3, p. 148, that would not allow Defendants to exclude them from school. The admission of aliens into the United States is committed by the Constittion to the federal government, Art. I. § 8, cl. 4, and is governed by the Immigration and Naturalization Act. 8 U.S.C. § 1101 et seq. Once the federal government has seen fit to admit an alien for permanent residence in the United State[illegible]e states are prohibited by the Supremacy Clause, Art. VI, cl. 2, from imposing additional burdens on an alien, such as making it more difficult for him to attend school. *Toll* v. *Moreno*, 458 U.S. 1 (1982). "Once an alien is lawfully admitted, a State may not justify the restriction of the alien's liberty on the ground that it wishes to control the impact or effect of federal immigration laws." *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 605 (1976). Disabilities that the states are prohibited from placing on aliens, they are surely prohibited from placing on citizens.

children from lawfully migrating to the United States to reside with a relative to attend school. *Def. Exh.* 3 at 94, 107 [A.81a, 86a]. This recommendation was presented to the Defendant Texas Education Agency in September, 1976. In 1977, two years after excluding undocumented aliens from school, the Texas Legislature added Section 21.031(d) to the admissions statute to accomplish this purpose.

The legislative history of Section 21.031(d), subsequent to the Alien Student Study, also compels the conclusion that the statute was enacted for the specific purpose of deterring "Mexican" children (who are, in fact, United States citizens) from establishing residence in Texas school districts. During the deliberations on Section 21.031(d) Senator Longoria, the Senate sponsor, stated:

> At the present time we're having a very difficult time—and along the border where the way the law is now, ah, anybody can qualify to go to school, and this bill merely makes it harder for them to—they have to establish that they moved into the district, not only for the purpose of attending school, but for other purposes as well, before they can be allowed to attend the schools . . . . [I]t will [time?] the restrictions, ah, to make it more difficult for kids to be brought in from Mexico to attend schools in the United States.

Plf. Exh. 6 [A. 58a, 59a]. Nowhere in the Senator's remarks did he express any concern for a need to define residence. Moreover, in enacting Section 21.031(d), the Legislature continued to insist that the children they were excluding from school were "Mexican" children rather than citizens. In his comments to the House Committee on Education, Rep. Torres stated that the bill was designed to address the problems along the border posed by children who are "citizens of another country." *Def. Exh.* 2 [A. 68a, 74a].

Thus, Defendants' own evidence establishes that the enactment of Section 21.031(d) was ethnically motivated for the sole purpose of deterring the migration of so called "Mexican" children to Texas school districts.

B. Deterring Migration Is An Impermissible State Purpose

Perhaps deterring one class of children from establishing residence in a state or district furthers state interests in easing budgetary and administrative difficulties. However, the State may not protect the public fisc in this way; deterring migration by United States citizens is an impermissible violation of a citizen's constitutional right to travel.

The right to travel freely among the States,

> occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

Shapiro v. *Thompson*, 394 U.S. 618, 630 (1969); See *Zobel* v. *Williams*, 457 U.S. ____, n.6, 50 U.S.L.W. 4613, 4615 (1982). *U.S.* v. *Guest*, 383 U.S. 745, 757-758 (1966); The right encompasses both the right to pass through other States, *Passenger Cases*, 7 How. 283, 492 (1849), and the right to establish a home in any State on an equal footing with other residents of that State. *Memorial Hospital* v. *Maricopa County*, 415 U.S. at 255; *Shapiro* v. *Thompson*, 394 U.S. at 629; *Edwards* v. *California*, 314 U.S. 160 (1941); *Slaughter-House Cases*, 16 Wall. 36, 80 (1873); *Corfield* v. *Coryell*, 6 F.Cas. 546, 551-552 (CCED Pa. 1825).

The leading case discussing the relationship between the right to travel and residence statutes is *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), where this Court struck down a one-year durational residency requirement for receipt of welfare benefits. The Court said the ". . . purpose of inhibiting migration is constitutionally impermissible." *Id.* at 629. Welfare is not a protected constitutional right. But, because of welfare's importance for the indigent, the Court reasoned that the denial of welfare, even temporarily, imposed a sufficiently harsh penalty to deter new residents from moving to the State and severely penalized those not deterred. That penalty was an unconstitutional burden on the right of indigents to migrate to the State. See also *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (temporary denial of the vote unconstitutionally burdens travel); and *Memorial Hospital*, 415 U.S. 250 (temporary de-

nial of non-emergency medical care unconstitutionally burdens travel).

The motivational residency requirement in Section 21.031(d) burdens Plaintiff's right to travel just as the durational statute in *Shapiro* burdened travel. Like the mothers in *Shapiro*, Plaintiff moved to McAllen "with the intent to settle and abide." *Memorial Hospital*, 415 U.S. at 255. The district court found that Plaintiff has satisfied fully the residence requirements applied to children admitted to school. 482 F. Supp. at 214, [FF. 7, A.22a]. Therefore, despite his motive, he has at least as much intent to settle and abide as is required of other residents. Because public education is a vital necessity of life, *Plyler*, 457 U.S. at ____, 50 U.S.L.W. 4655, depriving children of education imposes a penalty so extreme that it effectively forces them to move out of the district. Texas cannot deport Plaintiff or any other United States citizen. But Section 21.031(d) tries to accomplish that objective. If Roberto persists in exercising his constitutional right to live in McAllen, he must face the devastating consequences of growing up without an education.

C. Deterring Migration Based On Motive Is Also Impermissible

The district court and the court of appeals held that Section 21.031(d) did not violate the right to travel, despite the district court's finding that the statute was enacted specifically to deter migration. [FF. 37, A.27a]. Both courts reasoned that the right to travel/strict scrutiny analysis set forth in *Shapiro* is applicable only to *durational* residency requirements and not to *motivational* residency requirements. 648 F.2d at 428 [A.44a-45a]; 482 F. Supp. at 218 [A.30a-32a]. This holding is erroneous.

Shapiro, *Memorial Hospital*, and *Dunn* establish that a State may not make it particularly difficult for one class of residents to move to or to remain in a State by denying them important state benefits made available to other residents. Durational and motivational requirements are simply two ways in which residents may be divided into distinct classes and treated differently. *Shapiro* v. *Thompson*, 394 U.S. at 633;

Memorial Hospital v. *Maricopa County*, 415 U.S. at 255. It is the penalty imposed, not the device chosen for imposing the penalty, which burdens travel.[14]

In striking down a New York statute denying welfare benefits to migrants moving for the purpose of seeking such benefits, a three-judge court said:

> [T]he objective [of deterring migration], regardless of the statutory form by which it is implemented (whether in terms of duration of residency, burden of proof as to motive, or the like) has been foreclosed by *Shapiro* . . .
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> * * *
>
> [*Shapiro*] did not imply that an exception might be made permitting determent of those whose *sole* purpose in entering the State was to obtain higher . . . benefits. On the contrary [the Court] went on to state:
>
> 'More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally . . .' [*Shapiro* v. *Thompson*, 394 U.S. at] 631-632.
>
> Thus the Supreme Court has unequivocally barred a state from discouraging entry of indigents regardless of their motive in migrating.

Gaddis v. *Wyman*, 304 F. Supp. 717, 723 (S.D.N.Y. 1969), aff'd. *per cur. sub nom. Wyman* v. *Bowens*, 397 U.S. 49 (1970).[15] To the same effect, the Court in *Memorial Hospital*,

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[14] Durational and motivational requirements are not the only kinds of distinctions between residents which may violate the right to travel. See *Zobel*, 457 U.S.—, 50 U.S.L.W. at 4515.

[15] The motivational residency issue was squarely before this Court on the State's direct appeal. In its Jurisdictional Statement in *Wyman*, No. 69-866, the State of New York characterized the question on appeal as:

> Does this Court's ruling in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), unequivocally bar N.Y. State from denying welfare

415 U.S. at 264, held that a State could not deny benefits to persons whose sole reason for establishing a home in Arizona was to take advantage of its public health facilities. In *Williamson* v. *Osenton*, 232 U.S. 619, 625 (1914), the Plaintiff changed her residence for the sole purpose of taking advantage of federal diversity jurisdiction. The Court held that, "[t]he motive for the change [of domicile] was immaterial; for . . . the plaintiff had the right to select her domicil for any reason that seemed good to her."). *Morris* v. *Gilmer*, 129 U.S. 315 (1889). Hence, prior decisions of this Court preclude the State from imposing motivational burdens on travel to the same extent as durational burdens.

Thus, Roberto's desire to live with his sister and attend school, *per se*, does not provide a legitimate basis for discriminating against him. Each State has the right to experiment with different social and economic programs and to enhance the advantages of its industry, economy, and benefits in order to make the State a more attractive place to live. "That is a healthy form of rivalry: It inheres in the very idea of maintaining States as independent sovereigns within a larger framework . . ." *Zobel*, 457 U.S. at ____, 50 U.S.L.W. at 4617 (Brennan, J., concurring). But this right of the States necessarily implies the right of each citizen to "settle in the State offering those programs best tailored to his or her tastes." *Id.* at ____, 50 U.S.L.W. at 4619 (O'Connor, J., concurring). That individuals take state benefits into consideration, and, indeed, are motivated to live in a State because of the relative advantages of that State's benefits, is to be expected.

> benefits to otherwise eligible public assistance applicants whose sole motive in coming to the State was to receive such benefits?

Jurisdictional Statement at 3. The State went on to argue in defense of the statute that:

> The one year period referred to in the statute merely provides a convenient cut-off point beyond which applicants would no longer be scrutinized as to motives. The state could have omitted mention of the one year period entirely, since the object of the statute is to focus upon the applicant's motive in coming to the state.

Jurisdictional Statement at 11.

To allow a State to insulate itself and its current citizens from those who desire a particular state benefit would destroy the foundation on which the federal union is built.[16] Texas cannot close its borders and leave it for other States to absorb those in need. *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869); *Baldwin* v. *G.A.F.Seelig*, 294 U.S. 511, 523 (1935) (The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."). See also *Edwards* v. *California*, 314 U.S. 160, 173 (1941); *Hicklin* v. *Orbeck*, 437 U.S. 518, 532-533 (1978). Texas may not welcome Roberto if he lives in McAllen and works in its fields, but turn its back on him if he establishes a home there to obtain an education so that he can find a better job. See *Immigration Law and Rural Poverty—the Problems of the Illegal Entrant*, 1969 Duke L.J. 475 (1969).

Conditioning the right to travel on an a state approved motive also raises First Amendment questions. This Court recognized in *Aptheker* v. *Sec. of State*, 378 U.S. 500 (1964), that the right to travel, "is a constitutional liberty closely related to the rights of free speech and association . . ." *Id.* at 517. Denying benefits based upon the thoughts which motivate a person to travel to a place implies that some thoughts, though perfectly lawful, may nevertheless be penalized as "unworthy." As the Court stated in *Shapiro*,

> Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare

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[16] If a person's motive for migrating were a legitimate basis for discriminating against him, there would be no logical limit to the State's ability to interfere with travel. Logically the State could deny the vote to Roberto if he moves to Texas for the purpose of being able to vote in American elections. *Dunn*, 405 U.S. 330. It could deny him welfare if he moved for the purpose of obtaining welfare. *Gaddis* v. *Wyman*, 304 F.Supp. 717. It could allow a community with restrictive zoning laws to bar those who move because they like the type of community created by those zoning laws. Indeed, by the State's reasoning, the more committed a person is to the advantages of a community the less right he has to live there.

> benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its *better educational facilities*.

394 U.S. at 631-632 (emph. added). See also, *Memorial Hospital*, 415 U.S. at 264. Surely, if a mother's desire to move with her children to obtain better educational opportunities for them is a "deserving" motive, then a child who moves for that same reason is no less deserving.

Defendants admit that if Plaintiff migrated with his mother for the purpose of attending school he would be enrolled. *Reply to Pet. for Cert.*, at 16. But conditioning the right to travel on a state-approved living arrangement only compounds the unconstitutionality of the State's action by interfering with the right to family privacy. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Roe* v. *Wade*, 410 U.S. 113, 152-153 (1973). Although Texas may think that Plaintiff's living with his married sister is not "a natural situation," *Reply to Pet. for Cert.*, at p. 7, and that children "should live with their father or mother whenever possible," *Def. Exh.* 3, at 94 [A.81a], that is a choice for the family to make, not the State. The parents' decision as to what is best for their child, both in terms of living arrangement and in terms of education, is a matter of protected personal choice with which the State may not interfere, absent a compelling reason. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-234 (1972). See also *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 542-545 (1973) (Douglas, J., concurring).

The State's desire to ease budgetary strains on its schools does not justify interference with Roberto's right to live with his sister. Parents frequently rely upon relatives and friends outside the nuclear family to assist, permanently or temporarily, with the upbringing of their children. See *Moore* v. *City of East Cleveland*, 431 U.S. 494, 504-505 (1977). This is particu-

larly true among minorities and the poor. *Id.* at 508-510 (Brennan J., concurring). The decision to rely upon those outside the immediate family may be made for many reasons—personal choice, economic necessity, or a sense of responsibility for the best interests of the child. Responsible parents recognize, not without some pain, that assuring their children receive an education may, at times, be more important than controlling their day-to-day upbringing. The decision of Plaintiff's family that it was in his best interests to live with his sister to obtain the education he needs to function as an American citizen is a decision his family had "the right, coupled with the high duty" to make, and with which the State has no right to interfere. *Pierce*, 268 U.S. at 534-535; see *Wisconsin* v. *Yoder*, 406 U.S. at 232-233.

In sum, Texas cannot justify a statute whose purpose is to lessen budgetary burdens by keeping out new residents, particularly Mexican-Americans who have established their homes in Texas to obtain an American education. Roberto Morales' decision to establish a home in McAllen with his sister is his constitutional right as a United States citizen. That right cannot be abrogated by the State merely because he and his parents took into account the fact that McAllen suited his needs for an education. The statute is, therefore, unconstitutional.

> If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' *United States* v. *Jackson*, 390 U.S. 570, 581 (1968).

Shapiro, 394 U.S. at 631.

D. College Tuition Cases Are Distinguishable From This Case

The Defendants have relied upon several college tuition cases to argue that variations in tuition charges for education do not burden the right to travel. *Starns* v. *Malkerson*, 326 F. Supp. 234 (D.Minn. 1970) aff'd. 401 U.S. 985 (1971); *Sturgis* v. *Washington*, 368 F. Supp. 38 (W.D.Wash. 1973) aff'd. 414 U.S. 1057 (1973).

For several reasons, however, college tuition cases are simply not comparable to a case involving elementary and secondary education. First, beneficial as college education is, it is not a necessity of life. College is a benefit one can choose to have or do without. If necessary, it may be postponed for a year or two. By contrast, elementary and secondary education is a vital necessity, not just for the child, but also for the State which enforces its interest through compulsory attendance laws.[17] *Brown* v. *Bd. of Education*, 347 U.S. 483, 493 (1954); *Plyler*, 457 U.S. ____, 50 U.S.L.W. at 4655. Children, unlike college students, cannot "prove" their residence by staying in a place without attending school. If denied admission to school they must move somewhere else. Thus, while a waiting period requirement may not affect a college student's right to establish a home, even a brief waiting period imposes an impossible burden on a child's right. Second, the tuition penalties imposed in both *Starns* and *Sturgis* were only of limited duration. In the one tuition case where students were precluded from establishing residence for more than a year, the statute was struck down. *Vlandis* v. *Kline*, 412 U.S. 441 (1973); see also *Toll* v. *Moreno*, 458 U.S. 1 (1982).[18] Finally, in none of the college tuition cases was the residence statute enacted for the purpose of "excluding or even deterring out-of-state students from attending the University." *Starns*, 326 F. Supp. at 237. By contrast, Section 21.031(d) was enacted for precisely such a purpose.

For all of these reasons, the denial of reduced college tuition has not been characterized as a sufficient penalty to deter

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[17] Tex. Educ. Code § 21.032. One of the contradictions of Section 21.031(d) is that if Roberto exercises his right to remain in McAllen, but does not attend school because of Section 21.031(d), the State can take Roberto from his sister as a "child in need of supervision" and have a guardian appointed to assure that he attends school. Tex. Fam.Code § 51.03. See also Tex. Prob. Code. § 112. The Constitution requires something more than this sort of "Catch-22."

[18] This is not an unimportant distinction. Were he older, Roberto Morales would have qualified for in-state college tuition four years ago under the statute in *Starns* v. *Malkerson*, 326 F.Supp. 234.

migration.[19] See *Memorial Hospital*, 415 U.S. at 260, n.15. On the other hand, the penalty imposed by Section 21.031(d) is of such magnitude and duration as to make it virtually impossible for Plaintiff to exercise his right to travel to McAllen.[20]

III. TEX. EDUC. CODE § 21.031(d) DENIES PLAINTIFF EQUAL PROTECTION OF THE LAWS

In addition to violating the right to travel, Tex.Educ.Code § 21.031(d) denies Plaintiff equal protection of the laws. Texas

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[19] On the other hand, where important benefits such as voting are concerned, States have been required to draft precise and objective definitions of residence for college students. See *Whatley* v. *Clark*, 482 F.2d 1230 (5th Cir. 1973); *Ramey* v. *Rockefeller*, 348 F.Supp. 780 (E.D.N.Y. 1972) (three-judge court); *Bright* v. *Beasley*, 336 F.Supp. 527 (E.D.Ky. 1971); *Shivelhood* v. *Davis*, 336 F.Supp. 1111 (D.Vt. 1971). These cases are particularly apt here since the place of public education in constitutional analysis is similar to that of the vote. See *Plyler*, 457 U.S. at —, n. 15, 50 U.S.L.W. at 4654; *Id.* at —, 50 U.S.L.W. at 4658-4659 (Blackmun, J., concurring).

[20] The District Court also cites *McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976); *Wright* v. *City of Jackson*, 506 F.2d 900 (5th Cir. 1975); and *Andre* v. *Bd. of Trustees of Maywood*, 561 F.2d 48 (7th Cir. 1977), cert. den. 434 U.S. 1013 (1978), for the proposition that only durational statutes burden the right to travel. These cases involve the right of municipalities to require residence in the municipality as a condition of receiving the benefit of employment by the municipality. Right to travel was not implicated, not because of the absence of a durational requirement, but because the statutes involved did not draw distinctions between residents of the municipality, penalizing some but not others. Cf. *Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). These cases stand for the proposition that a municipality may require *de facto* residence within its borders as a condition of receiving the benefit of municipal employment, just as a state may require *de facto* residence within a school district as a condition for attending school. They do not stand for the proposition that motivational residency requirements are permissible burdens on the right to travel. Although a city can require employees to live within its borders, it could not refuse to hire a city resident because he established his residence in the city for the primary purpose of seeking public employment.

has undertaken to make a public education available to children who reside in the State. Tex. Educ. Code § 21.031(b). On its face, Tex. Educ. Code § 21.031(d) discriminates against one class of children living in Texas—those who live with custodians for the purpose of attending school—and deprives them of an education which is made available to all other children living in Texas, regardless of their motives for establishing residence or their living arrangement. Before examining the State's justifications for depriving this one class of children of an education, it is necessary to determine the level of scrutiny which will be applied to those justifications.

A. Strict Scrutiny Should Be Applied To The Statute Or Alternatively Heightened Scrutiny Should Be Applied

The discussion in the preceding section sets out three independent reasons which require the application of strict scrutiny to Section 21.031(d). First, the statute was passed for the express purpose of deterring and penalizing the lawful migration of United States citizens. Statutes which penalize the right to travel require the application of strict scrutiny. *Shapiro*, 394 U.S. at 634. Even if the statute were not intended to deter travel, strict scrutiny is, nevertheless, required. The legislative motive for enacting the statute is irrelevant because the statute has the effect of deterring or penalizing travel. *Dunn*, 405 U.S. at 339-340.

Second, the statute was not merely designed to deter migration, but to deter migration by a specific group: children of Mexican origin, see supra, pp. 14-17. Governmental action intended to deny benefits to a racial or ethnic minority is constitutionally suspect, and must be subjected to strict scrutiny. *Griffin* v. *County School Bd. of Prince Edward Co.*, 377 U.S. 218, 231 (1964). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded on a doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100

(1943). See also *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369 (1957).[21]

Third, the statutory classifications of Section 21.031(d) directly interfere with family privacy rights by imposing disabilities on a child because the family has decided that it is in his best interests to live with relatives or friends. Statutes which interfere with family decisions with respect to living arrangements and education must also be subjected to strict scrutiny. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977).

Plaintiffs strongly urge that the Court should apply strict scrutiny for these reasons. However, if the Court declines to do so, heightened constitutional scrutiny must still be applied to Section 21.031(d), because the statute deprives Plaintiff of an education. [FF. 25, A.25a]. Public education is not a fundamental right guaranteed by the Constitution, *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 35 (1973), but neither is it,

> merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Plyler, 457 U.S. at ____, 50 U.S.L.W. at 4655. Because of the vital importance of education to all who would participate in American society, statutes which deprive children of an education are not entitled to the usual deference accorded to State legislative choices. Texas must justify the discrimination ef-

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[21] This is not an argument that school administrators apply the statute in a discriminatory manner which adversely affects Mexican-Americans, a claim not raised in the district court. Rather, the legislative history reveals an intent by the legislature to discriminate on the basis of national origin. On its face, the classifications in the statute uniquely affect, as a class, citizens with Mexican parents. The U.S. citizen children of Mexican parents are the only children who, as a class, must live in Texas apart from their parents in order to attend school.

fected by the statute by demonstrating that it is at least substantially related to a substantial state interest. *Plyler*, 457 U.S. at ___, 50 U.S.L.W. at 4656; see also *Craig* v. *Boren*, 429 U.S. 190, 197-198 (1976).[22]

The classifications drawn by Section 21.031(d) cannot withstand either strict or heightened scrutiny. Section 21.031(d) is not rationally, let alone substantially related to any legitimate state purpose. It can hardly, therefore, be justified as necessary to promote compelling state interests.

B. Tex. Educ. Code § 21.031(d) Does Not Pass Either Strict Scrutiny Or Heightened Scrutiny And Therefore Denies Plaintiff Equal Protection Of The Law

The district court identified three state purposes which it found to be legitimate and sufficient to justify Section 21.031(d). First, the statute serves as a guideline for determining residence. Second, the statute acts to preserve the finances and quality of Texas public schools. Third, the act protects the schools from a number of administrative and budgetary planning problems related to inter-district transfers. A. 26a-27a, 482 F. Supp. at 215-216.

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[22] There is another reason for applying heightened scrutiny. The dilemma of the citizen child whose parents cannot legally enter the U.S. cannot justify placing special burdens on the child when he seeks to obtain an education in the United States. See *Plyler*, 457 U.S. at ___, n.3, 50 U.S.L.W. at 4660 (Powell, J., concurring); cf. *Schneider* v. *Rusk*, 377 U.S. 163 (1964). Just as the children in *Plyler* could not affect their parents' conduct or status, citizen children cannot affect the circumstances which compel them to move away from their parents to exercise their rights as citizens. Legislative disabilities imposed upon a class of persons for conduct or characteristics over which they have no control are "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972). For this reason such disabilities should be examined with heightened constitutional scrutiny even if the denial of education alone did not trigger such scrutiny. *Plyler*, 457 U.S. at ___, 50 U.S.L.W. at 4566; *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977).

These interests are the same interests which were offered to support the denial of benefits to residents in *Shapiro*, 394 U.S. 618, and *Memorial Hospital*, 415 U.S. 250. They were not even rationally related to the exclusion of indigents from welfare, and they are not rationally related to the exclusion of children from public school. *Shapiro*, 394 U.S. at 638. Moreover, with the exception of the first purpose—defining residence—these state purposes are served by the device of attempting to stop inter-state migration, the explicit legislative intent of the statute. Such an attempt is *per se* an impermissible state purpose regardless of the level of scrutiny applied. *Shapiro*, 394 U.S. at 629. As the court in *Gaddis* stated: "that objective [is] foreclosed." 305 F. Supp. at 723. Therefore, the purpose of deterring migration necessarily taints the subsidiary objectives the State is pursuing by such deterrance. A State simply cannot attempt to solve fiscal or administrative problems by taking care of long term residents to the exclusion of newcomers.

The State's interests cannot pass strict scrutiny. To satisfy strict scrutiny this Court requires that a statute serve a *compelling* state interest, and that it be a *necessary* means of promoting that interest.

> Statutes affecting constitutional rights must be drawn with "precision," *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *U.S.* v. *Robel*, 389 U.S. 250, 265 (1967), and must be "tailored" to serve their legitimate objectives. *Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969). And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

Dunn v. *Blumstein*, 405 U.S. 330, 343 (1972).

The district court did not find that Section 21.031(d) met this test. In fact, the district court acknowledged that more precisely tailored and less restrictive means of achieving the

State's interests are available. The court stated that its findings,

> [do] not mean that the statute is perfect or that the Legislature could not have found a more precise or more equitable way to draw lines between resident and non-resident students.

482 F. Supp. at 222 [A.40a]. Although the court of appeals concluded that Section 21.031(d) would pass strict scrutiny [A.45a], it relied entirely upon quotations from the district court to reach that conclusion. Absent from those quotations was any finding that Section 21.031(d) was "precisely drawn" and "necessary" to promote the State's interests.

As the district court indicated, numerous less restrictive alternatives are available to the State, which would more precisely determine who is a *bona fide* resident. See *infra* pp. 36-38. Objective criteria and affidavits of intent to make a school district one's permanent residence are two of the more common means used by States to establish the *bona fide* residence of children living with custodians. Because of the existence of these less restrictive alternatives, Section 21.031(d) cannot under any circumstances pass strict constitutional scrutiny, even if the State interests were compelling, which they are not. *Shapiro*, 394 U.S. at 627. As the following sections make clear the statute fares no better under heightened scrutiny.

1. Texas Education Code § 21.031(d) Is Not Substantially Related To The State's Interest In Defining Residence

The district court found that that statute offered a guideline for defining the residence of minors living apart from their parents or guardians. This justification for the statute cannot pass heightened scrutiny for three reasons: (a) the "guideline" does not define residence but instead creates a distinct and independent criteria of proper motive for residence; (b) even if Section 21.031(d) were a definition of residence it does not substantially further the State's interest in determining residence; and (c) reasonable, less restrictive definitions are available.

(a) Section 21.031(d) is not a definition of residence, but rather a distinct and independent requirement of proper motive wholly extraneous to the determination of school residence. In support of its finding that the statute defines residence, the district court stated that a child who migrates for the purpose of obtaining an education "necessarily lacks the permanence to be classified as a resident." [A.34a]. The court assumed this fact and called it a "truism" but never addressed the question of why it was necessarily so. [A.34a]. In fact, the connection drawn between motive and school residence is without foundation in fact or in law.

As a matter of law, even if Plaintiff's motive did indicate a lack of permanence in his decision to reside in the district, Texas requires no degree of permanence or intent-to-remain indefinitely in order to be a resident for school admission. Because it is so vital that children attend school, the normal residency requirement of intent to remain is not applied in the public school context. A person who moves to Texas from Virginia with a fixed intention of returning to Virginia after six months is a school resident of Texas during those six months. *Plyler*, 457 U.S. at ____, n.22, 50 U.S.L.W. at 4656-4657; *Id.* at ____, n.4, 50 U.S.L.W. at 4660 (Powell, J., concurring). School residence in Texas amounts to nothing more than *de facto* residence in school district at the beginning of the school year, a standard which is applied to children who live with custodians as well as children who live with their parents.[21] Thus, whether

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[21] No minimal amount of prior residence is required for a child living with a custodian. See e.g. *Plf. Exh.* 8-71 (Application for Ismael Trevino, 2-23-78) (one week prior residence with grandmother sufficient for admission as a resident); 8-86 (Application for Rene Vela, 2-17-78)(one day prior residence with non-relative sufficient for admission as a resident). No intent to remain is required. See e.g. Plf. Exh 8-941 (Application for Melanie Elena Adams, 9-22-78) (Mother sent child to live with grandmother but "will come in December or so to take children back to Dallas possibly"—admission as resident approved). The school district does not even require children living apart from their parents or guardian to have an intent to reside continuously with the district. See *Plf. Exh.* 8-1058

Plaintiff's desire to attend school indicates lack of permanence or not, that fact is irrelevant to the determination of school residence. Moreover, because intent to remain is irrelevant to school residence in Texas, the district court's finding that children living apart from their parents lack the capacity to form an intent to remain is equally irrelevant to their ability to establish school residence. 482 F. Supp. at 221 [A.37a-38a]. Defendants have acknowledged that children living apart from their parents or guardians have the capacity to establish a school residence by allowing them to enroll in school as residents, as long as they do not have the prohibited motive.

Second, even if an intent to remain for some minimum amount of time were required to establish school residence in Texas, the motive requirement would still be irrelevant to the determination of residence. As a factual matter, the desire to attend school is entirely consistent with an intent to remain in a place and make it one's home.[24] Frequently public benefits provide a compelling reason for remaining in a particular place. Indeed, as discussed above, *supra* pp. 19-23, the purpose of obtaining state benefits is constitutionally irrelevant to the determination of residence. *Shapiro*, 394 U.S. 618; *Memorial Hospital*, 415 U.S. 250. See also *Williamson* v. *Osenton*, 232 U.S. 619, 625 (1914) (move for purpose of establishing federal diversity jurisdiction is "immaterial" to the validity of residence). Roberto Morales himself demonstrates this point. He has resided continuously in McAllen for five years. Throughout those five years he has been a resident under the traditional

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(Application for Leticia Zamora, 11-6-78) (child lives with aunt in Texas during the school year and spends summers with parents who live in Florida—admission as resident approved).

[24] The district court concluded that "a person who only intends to remain in a given place *temporarily* in order to take advantage of a particular benefit at that location, lacks permanence . . ." [A.34a] (emph. added). A person who moves *temporarily* lacks permanence regardless of his motive. A person, like Plaintiff, who moves and establishes a home in order to take advantage of a particular benefit does not lack permanence.

criteria of residence applied to those without the prohibited motive. [FF.7, A.22a]. Moreover, his desire for an education will keep him in McAllen for at least another five years.[25] He has therefore demonstrated an intent to remain which is far greater than that of the family from Virginia discussed in *Plyler*, 457 U.S. at ____, n.22, 50 U.S.L.W. at 4656-7.

Texas schools do not care about the permanence of a child's residence. Even if they did, a child's purpose for living in a school district is factually and constitutionally irrelevant to the permanence of his residence. Therefore, requiring a child to have a State approved purpose for living in a school district has absolutely nothing to do with "residence" as that term is applied to all school applicants, other than those excluded by Section 21.031(d). Calling Plaintiff a "non-resident" because he wants to go to school is exactly like calling an alien child a "non-resident" because he is undocumented. The response is the same in either case: a State may not discriminate against a disfavored group simply by calling its distinguishing characteristic a "definition" of non-residence. *Plyler*, 457 U.S. at ____, n.22, 50 U.S.L.W. at 4657.

Finally, the concept of a person's "primary purpose" for living somewhere is so ambiguous, and allows for so many equally appropriate descriptions, as to be completely meaningless as a definition. For example, indigent Mexican parents with little or no income and many children to feed may feel they are unable to adequately prepare their citizen child for adult life in the United States and so send him to live with an economically more secure relative in Texas. His move to the

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[25] The district court's finding that Roberto Morales intends to live in McAllen only until he completes school is clearly erroneous. See *U.S.* v. *Gypsum*, 333 U.S. 364 (1948). The only evidence of Plaintiff's intention is the stipulated testimony in *Plf. Exh.* 1 (A. 53a). The stipulation indicates that Roberto intends to remain in McAllen until he completes his education, but gives no indication one way or another as to his intentions after he completes school. [A.54a] What Roberto Morales will do in 1987 when he is graduated is a matter of pure speculation at this point, even for Roberto. *Rawey* v. *Rockefeller*, 348 F.Supp. 780, 788 (E.D.N.Y. 1972) (three-judge court).

United States can be described with equal accuracy as being for the primary purpose of attending school, or for the primary purpose of placing him with someone better able to care for him. The distinction is a matter of semantics. Yet Section 21.031(d) denies children an education based on just such distinctions.[26]

An examination of the applications for admission to McAllen schools, *Plf. Exh.* 8, leads to the inescapable conclusion that the reason a child lives apart from his parents or guardian is not for "primary" and "secondary" reasons. Rather, a child lives apart from his parent or guardian because, after all of the relevant factors have been considered, his family concludes it is in his best interests to do so. One of the principal considerations of any parent determining the best interests of his child, is, or ought to be, his child's education. In that sense, education is a primary consideration of all parents and children when they decide to live apart. Whether education is determined to be a child's "primary purpose" probably depends as much on how the question is asked or how articulately the child expresses himself as on anything else. Compare *Plf. Exh.* 8-381 (Application for Amalia Salinas, 8-22-78) ("Amalia refuses to live with step-father for personal reasons"—admitted) with 8-1039 (Application for Gabriel Lara, Jr., 10-23-78) ("Gabriel does not like step-father"—not admitted). The unfettered discretion to characterize a child's motives inherent in the notion of "primary purpose" demonstrates the utter uselessness of Section 21.031(d) as a "guideline" for determining residence.

The State's interest in a guideline for determining school residence is not served by a definition which draws only semantic distinctions between motives irrelevant to school residence. Such a statute is certainly not so substantially related to the

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[26] Compare *Plf. Exh.* 8-12 (Application for Ma.G.Adame, 5-18-78) (Child, 11, lives with sister, "There are 5 other children with mother in Mexico—Mr. Adame cannot afford to start visa proceedings"—admission granted) with 8-566 (Application for Jose Pena, 8-31-78) (Child, 11, lives with sister, "Ms. Espinoza [sister] claims that Jose's mother is in Mexico because an older son of hers is very ill. She is starting procedures to get herself legalized."—admission denied);

State interest in a definition of residence as to justify the permanent and debilitating injury suffered by those, like Plaintiff, the statute wrongfully classified as non-residents.

(b) There is a second reason why Section 21.031(d) is indefensible as a guideline for determining the residence of children living with custodians. By singling out only one motive for living with a custodian, the statutory guideline is irrelevant to 90% of the children who live with custodians, since they do so for other motives. *Def. Reply to Pet. for Cert.*, at 3. A guideline which is utterly irrelevant to 90% of those whose residence it is supposed to define can hardly be said to substantially further the State's interest in a residence guideline. See *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966). The statute's uselessness as a means of determining the residence of children living with custodians highlights what is obvious from the legislative history: the statute was not designed as a means of determining residence, but as a means of selecting one group of children for exclusion from school.

(c) Defining the residence of children living with custodians in terms of motive is made all the more irrational by the fact that far less drastic means of determining the residence of such children are readily available to the schools. First, Defendants suggest no reason why children living with custodians cannot have their residence determined the same way children living with parents have theirs determined. Defendants already treat 90% of children with custodians in this fashion. Children who live with custodians and children who live with parents are treated similarly by other benefit programs. For example, contrary to the district court's finding [FF. 31, A.26a], federal education benefits are made available for children living with custodians on the same basis as children living with parents, without reference to motive or other special definitions.[27]

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[27] For example, were he handicapped, Roberto would qualify for education assistance under the "Education for All Handicapped Children Act of 1975," 20 U.S.C. § 1401 et seq. That statute provides, "a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State

Alternatively, if Texas feels that children living with custodians pose special problems for determining residence, the State could define residence in terms of objective factors such as where the child regularly eats and sleeps, where he spends his weekends and vacations, or who is providing his support.[25]

. . ." 20 U.S.C. § 1412(b). The regulations promulgated under the Act specifically recognize that some children receiving education under the Act will live with a custodian: "The term parent is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare." 34 C.F.R. § 300.10.

The "Elementary and Secondary Education Act of 1965," 20 U.S.C. § 2701 et seq. makes funds available for the education of children with special needs, such as the children of migrant farm workers. That Act also recognizes the custodial relation and treats it in the same way as children living with a parent or guardian. See 20 U.S.C. § 2854(11) and 34 C.F.R. § 204.3(d)(5).

Special assistance for schools affected by federal installations is provided regardless of whether the children are living with a parent, guardian, or custodian. 20 U.S.C. § 238 and 20 U.S.C. § 244(3).

Roberto is eligible for Aid to Families With Dependent Children and Food Stamps while he lives with his sister, regardless of whether she is a court-appointed guardian or not. 42 U.S.C. § 606(a) and 7 U.S.C. § 2012(i).

[25] See e.g. Colo. Rev. Stat. § 22-1-102(2) (1974) provides:

"A child shall be deemed to reside in a school district if: . . . (g) Regardless of the residence of the parents, if any, the child adopts a dwelling place within the district with the intent to remain there indefinitely and with the intent not to return to the dwelling place from which he came, and regularly eats or sleeps there, or both, during the entire school year as defined in section 22-1-122; but the child shall be deemed not to have the requisite intent if he regularly returns to another dwelling place during summer vacations or weekends." (This latter requirement distinguishes Plaintiff from children at boarding school). See also N.Y. Educ. Law § 3202 4(b) (McKinney 1981); Kan. Stat. Ann. § 72-1406 (1980); Conn. Gen. Stat. § 10-253(d) (1981 Cum. Supp.).

If the State is concerned that children who migrate for school purposes do not have sufficient permanence to be classified as residents, the school could require an affidavit of intention to remain from the child's custodian or parent.[29] Defendants have made absolutely no showing that the above alternatives are not adequate to serve their interest in defining residence.

For all of the foregoing reasons, defining residence by a child's motive for establishing residence is not rational, let alone substantially related to a substantial state interest.

2. Excluding Plaintiff From School Is Not Substantially Related To The State's Interest In Protecting The Finances And Quality Of Its Public Schools

Protecting the finances and quality of Texas public schools does not justify excluding an entire class of children from school simply because they have established homes in Texas for the primary purpose of attending school. Defendants offered no evidence that the,

> educational resources of the State are so direly limited that some form of 'educational *triage*' might be deemed a reasonable (assuming that it were a permissible) response to the State's problems. 501 F. Supp. at 579-581.

Plyler, 457 U.S. at ____, n.25, 50 U.S.L.W. at 4657. Second, there is considerable doubt whether, given Texas' system of financing schools, the exclusion of a particular class of children from schools actually results in any improvement in the quality of education provided by the State. *Plyler*, 457 U.S. at ____, 50 U.S.L.W. at 4657.

In any event, this "lack of resources" argument proves too much. It would justify excluding any group from school.

> [A] state may 'not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools.' *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). . . . [E]ven if improvement in the quality of educa-

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[29] See e.g. N.J. Stat. Ann. § 18A:36-1(b) (West Cum.Supp. 1981); Pa. Cons. Stat. Ann. § 13-1302 (Purdon Cum.Supp. 1981).

> tion were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion.

Plyler, 457 U.S. at ____, 50 U.S.L.W. at 4657. As discussed above, *infra* pp. 19-23, the purpose of attending school, *vel non*, is not a legitimate basis for discriminating against Plaintiff. Therefore, if the State is to justify Section 21.03(d) it must show that there is some other characteristic of children with that motive which makes it appropriate to target them for exclusion from school. *Plyler*, 457 U.S. at ____, 50 U.S.L.W. at 4656; *cf. Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966). This the Defendants have failed to do.

Defendants produced no evidence to indicate that their litany of problems associated with an influx of new-comers is in any way peculiar to children who move for the purpose of attending school. The impact of an influx of new school applicants is the same whether they move for the purpose of attending school or for the purpose of escaping a bad family situation, whether they live with parents or grandparents, or whether the grandparent is a court-appointed guardian or a custodian.

The problems recited by the State are the problems of migration generally. They are identical to the problems claimed to justify the denial of welfare in *Shapiro*, 394 U.S. 618, the denial of medical care in *Memorial Hospital*, 415 U.S. 250, and the exclusion of undocumented alien children from school in *Plyler*, 457 U.S. ____, 50 U.S.L.W. 4650. At least in *Plyler*, the State claimed that undocumented children as a class had greater educational needs and therefore imposed greater costs upon the schools than did other children. Defendants have not even tried to prove that children who have migrated for the purpose of attending school, as a class, have greater needs or impose greater costs on the schools than children with other motives. Indeed, one of the premises of Defendants' own evidence, the *Mexican Immigrant-Alien Student Study 1975-1976*, is that the impact on the schools from "Mexican" students is the same regardless of their living arrangements or motives. The study treats all "Mexican" chil-

dren as an undifferentiated problem. *Def. Exh.* 3. *Doe* v. *Plyler*, 458 F. Supp. at 576.

The arbitrariness of excluding children who move for the purpose of attending school and who live with a custodian is apparent from the numbers of such children. Defendants greatly exaggerate the numbers of students who would enroll if Section 21.031(d) were invalidated. The district court's finding that "thousands" of new students will move to Texas school districts in the absence of Section 21.031(d) was based upon nothing more than the unadorned speculation of school administrators.[30]

The best evidence of the number of children excluded by Section 21.031(d) is the records of school applications kept by the McAllen school district. *Plf. Exh.* 8. Those applications sharply contradict the Defendants' claim. They indicate that the number of students excluded pursuant to Section 21.031(d) each year by the McAllen school district is far less than the thousands alleged.[31] The small number of applications reflects the fact that only in unusual circumstances will parents make the difficult decision that their child should leave his parents'

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[30] By stipulating that school administrators would testify to this claim, Plaintiffs did not stipulate to the truth of the claim. There is no foundation to show what evidence the school administrators relied upon to make such predictions. The predictions in the *Mexican Immigrant-Alien Student Study*, *Def. Exh.* 3, have no better foundation since they are based on interviews with the same superintendents.

[31] The numbers in *Plf. Exh.* 7 are incorrect. *Plf. Exh.* 8 reveals approximately 29 children, in addition to Plaintiff, denied admission to school pursuant to § 21.031(d) during the one year period that written applications were kept. See *Plf. Exh.* 8-46; 8-346; 8-425; 8-441; 8-446; 8-447; 8-494; 8-566; 8-590; 8-738; 8-740; 8-749; 8-815; 8-829; 8-935; 8-1034; 8-1035; 8-1039; 8-1090; 8-1091; 8-1096; 8-1097; 8-1149; 8-1150; 8-1247. Even 29 applications a year is probably more than are received by other Texas school districts, because McAllen, as a border school district receives an unusually high number of applications from Section 21.03(d) children. *Def. Exh.* 3; *Plf. Exh.* 6, A.59a.

home to live with someone else. Practical problems in finding a custodian for the child who can provide him with food, clothing, and shelter also limit the number of children who can, in fact, live apart from their parents.

Thus, insofar as Defendants seek to justify Section 21.031(d) as a means of protecting the finances and quality of the public schools, the decision to exclude those who have moved for the purpose of obtaining an education is no more permissible as a device in Texas' educational *triage* system than the decision to exclude undocumented aliens. *Plyler*, 457 U.S. ____, 50 U.S.L.W. 4650.[32]

Indeed, in some respects, excluding children pursuant to Section 21.031(d) is counter-productive of the State's asserted goal in *Plyler* of discouraging illegal migration. Many Mexican parents see their future well-being, and that of their children, as based on their citizen children obtaining steady jobs in the United States. Because of Section 21.031(d), the only way a Mexican parent can be assured his citizen children receive the education necessary for economic advancement is for the parent to live in the United States with his children. Under these circumstances, a Mexican parent may well feel that it is worth risking deportation to assure that his child is educated. Section 21.031(d) irrationally penalizes parents who remain in Mexico by denying their children admission to Texas schools, and rewards those parents who migrate illegally with their children by admitting their children to school.

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[32] Defendants' claim that Section 21.031(d) in some way makes enrollment in the schools more predictable fails for the same reason. If Subsection (d) makes enrollment more predictable, it does so by reducing the total number of eligible students. That rationale would justify excluding any student migrating to the State as a means of making enrollment more predictable. No evidence justifies excluding Plaintiff as the one to help make enrollment more predictable. Section 21.031(d) is not substantially related to increasing enrollment predictablity. *Shapiro*, 394 U.S. at 634-635; *Memorial Hospital*, 415 U.S. at 269.

3. Intra-State Transfer And Planning Problems Do Not Justify Section 21.031(d)

The district court found that Section 21.031(d) was rationally related to the State's interest in protecting the schools from the effects of children transferring from one Texas school district to another.[33] This finding was erroneous, however, because the problems of intra-state (inter-district) migration cannot justify solutions which penalize inter-state travel, *Memorial Hospital*, 415 U.S. at 256, and in particular which penalize the inter-state travel of the party before the Court. The court need not, therefore, decide whether it would be permissible to enact a statute which was specifically directed at deterring intra-state migration.[34] In any event, applying heightened scrutiny, it is plain that Section 21.031(d) does not substantially further the State's interest in protecting the school districts from the costs and burdens of inter-district migration.

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[33] Nowhere in the legislative history of Section 21.031(d) is there any mention that the act is designed to address the problems of intra-state migration. In the absence of any evidence that the statute was designed to serve such purposes, it is improper for the Defendants to raise them in defense of the statute, and they should not be considered. *Trimble* v. *Gordon*, 430 U.S. 762, 776 (1977).

[34] Interference with intra-state travel is no more justifiable than interference with inter-state travel. The right to establish a home in a locale on an equal footing with other residents should not depend upon the place from which a citizen moves. *Dunn*, 405 U.S. 330 (county residence requirement invalidated); *Valenciano* v. *Bateman*, 323 F.Supp. 600, 603 (D.Az. 1971). Defendants' concern with intra-state transfers is, of course, a red-herring in this case. The problems associated with such transfers could, if necessary, be addressed without interfering with inter-state travel because intra-state transfers can easily be detected by simply looking at the previous address of a migrant. Indeed, the State already has an elaborate statutory scheme for dealing with transfers between school districts. Tex. Educ. Code §§ 21.061-21.081.

a. Fraudulent transfers

Section 21.031(d) is irrelevant to the problem of children fraudulently claiming they live in one district, when in fact they are commuting from a neighboring district. A child intent upon defrauding the school district could more easily lie about his subjective motive for moving than he could lie about the objective fact of his residence address. *Memorial Hospital*, 415 U.S. at 268. This statute, like the one in *Dunn*, is an, ". . . effective obstacle only to residents who tell the truth. . . ." 405 U.S. at 346-347. Children fraudulently claiming to live in a district are, of course, non-residents under a separate statute, Section 21.031(c), independent of their motive for claiming residence. *Shapiro*, 394 U.S. at 637. Defendants have offered no evidence to show that Section 21.031(d) is in any way necessary or even useful to supplement Section 21.031(c).

b. Migration to more attractive districts

The Defendants complain that, without Section 21.031(d), children will migrate to schools which offer better educational programs, leading to over-crowding in some schools and under-utilization of others. However, such migration is part of normal demographic change. Every day, families with the economic means to do so move to assure a better education for their children. Defendants have offered no evidence, other than the unsubstantiated fears of school administrators, that migration by children apart from their parents is a measurable source of such demographic change. Significant population shifts by children would seem unlikely unless one assumes, as Defendants apparently do, that as a general rule, parents have no interest in living with their children. Moreover, Defendants have not offered a legitimate reason for discriminating only against those who engage in such migration apart from their parents.

To the extent that the problems of inter-district migration flow from migration for school purposes, the problem lies not in the motives of those who migrate, but in the vast disparity in the quality of Texas' school districts. Texas schools are funded,

in substantial part, through local property taxes. This system allows wealthy districts to spend far more per pupil for education than poorer districts. In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), the State vigorously defended this school financing scheme despite the obvious inequalities it produced in the quality of education available in different districts, and the Court upheld the system's constitutionality. But implicit in the decision in *San Antonio School Dist.* was the assumption that no legal barriers existed to prevent the poor from moving to wealthier school districts if education was that important to them. *Id.* at 122 n.83 (Marshall, J., dissenting); *Memorial Hospital*, 415 U.S. at 271 (Douglas, J., concurring). Now Defendants want to prevent even that migration and defend Section 21.031(d) as a means of doing so. The statute is, of course, well suited to preventing only poor children from moving to better school districts. Parents in higher economic brackets who wish to send their children to a better school district will not be deterred by moving, paying tuition, or hiring a lawyer to obtain a guardianship.[35]

Defendants cannot have it both ways. If the State is going to finance the schools in such a way that some districts are able to spend far more on education than others, it must accept the fact that those for whom the quality of education is of paramount importance will take that disparity into account in deciding where to live. Cf. *Doe* v. *Plyler*, 458 F. Supp. at 589-590.

c. Athletic transfers

Defendants argue that Section 21.031(d) is necessary to protect the schools from students transferring to districts with better athletic opportunities. This claim is also spurious. Texas, like most states, has interscholastic league rules which control athletic transfers by declaring students ineligible for

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[35] Of course, striking down Section 21.031(d) will hardly make the poor more mobile. For a child to live in a suburban school district, he still must find a resident custodian to live with who is willing to accept the responsibility of caring for him.

athletic competition for a certain period after they have moved from one district to another. See *Sullivan* v. *University Interscholastic League*, 616 S.W.2d 170 (Tex. 1981); see also *Denis O'Connell High School* v. *Virginia High School*, 581 F.2d 81, 85 (4th Cir. 1979); *Walsh* v. *Louisiana High School Athletic Ass'n.*, 428 F. Supp. 1261 (E.D.La. 1977). It is unconscionable for the Defendants to argue that absolutely depriving children of an education (many of whom do not play inter-scholastic sports) is a rational solution to the problems of athletic recruitment when these alternatives are available. This is particularly true in light of the Texas Supreme Court's decision that the far less drastic penalty of precluding participation in sports is, itself, an irrational solution to the problem. *Sullivan*, 616 S.W.2d 170; see also *ABC League* v. *Mo. State High School Activities Ass'n.*, 530 F. Supp. 1033 (E.D.Mo. 1981). Defendants have submitted no evidence to indicate that much more carefully drawn and less restrictive rules are not sufficient to serve the State's interest in discouraging recruitment of high school athletes.

d. School desegregation

In their *Reply to the Petition for Certiorari*, at p. 9, Defendants argue for the first time that Section 21.031(d) is somehow related to assuring compliance with desegregation orders. The Defendants did not offer any evidence that Section 21.031(d) has a positive effect on the State's interest in desegregation, nor could they, given that the explicit motivation for the legislation was to discriminate against Mexican-Americans. This "desegregation" statute was not designed to stop "white flight"; it was designed to keep persons of Mexican origin out of the State. It is thus hardly surprising that this racially discriminatory statute is not particularly well suited to accomplishing a desegregation purpose.

To whatever extent preventing migration for the primary purpose of attending school helps to prevent "white flight," it is equally effective at preventing minorities from moving to all-white school districts. E.g. *Spriggs* v. *Altheimer, Ark., School District No. 22*, 385 F.2d 254 (8th Cir. 1967). In fact, the Texas statute is more likely to hamper minorities' efforts to integrate

than it is to help those efforts. Section 21.031(d) creates a barrier only for those whose economic status is such that the family cannot afford to move as a unit or obtain guardianships for their school-age children.

Thus, whatever effect Section 21.031(d) may have upon desegregation, the effect is so tangential and equivocal that the Act cannot be justified as being rationally, let alone substantially, related to the State's interest in desegregation. Cf. *In re Alien School Children Litigation*, 501 F. Supp. 544, 581-582 (S.D.Tex. 1980).

IV. TEX. EDUC. CODE § 21.031(d) CREATES AN INVALID IRREBUTTABLE PRESUMPTION OF NONRESIDENCE AND THEREFORE DENIES PLAINTIFF HIS INTEREST IN PUBLIC SCHOOLING WITHOUT DUE PROCESS OF LAW

Section 21.031(d) deprives Plaintiff of his interest in education by means of an invalid, irrebuttable presumption of nonresidence under this Court's ruling in *Vlandis* v. *Kline*, 412 U.S. 441 (1973), as limited by *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

Vlandis involved a statute which defined residence for in-state college tuition purposes. The statute presumed that any student whose initial application to college was made from out-of-state remained a non-resident, ineligible for reduced tuition throughout his college career. The Court found that because that presumption was neither necessarily nor universally true and precluded an opportunity to show relevant facts of residence, it denied reduced tuition without due process to those students conclusively categorized as nonresidents. The holding of *Vlandis*—that presumptions about residence or domicile deny due process—remains valid where,

> a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.'

Elkins v. *Moreno*, 435 U.S. 647, 660 (1978), quoting *Weinberger* v. *Salfi*, 422 U.S. at 771.

In determining eligibility for public school attendence, Texas purports to be concerned with residence. Tex.Educ. Code § 21.031(b). Subsection (d), on the other hand, defines residence by identifying one characteristic—the desire to attend school—and by presuming that a child with that desire is a non-resident if he is living with a custodian instead of his parents or court-ordered guardian. This presumption is based on the theory that a child with the prohibited motive, "necessarily lacks the permanence to be classified as a resident." [A.34a, 482 F. Supp. at 219].[36]

The presumption that children with the prohibited motive cannot be residents is irrebuttable under Section 21.031(d). Once it is determined that a child is living with a custodian for the prohibited motive, no amount of evidence of the most positive kind can overcome the conclusion that he is a non-resident. In this way, Section 21.031(d), like the statute in *Vlandis*, denies Plaintiff the opportunity to show factors clearly bearing on his residence, e.g., his continuous *de facto* residence in McAllen for five years.[37]

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[36] The motivational definition in Section 21.031(d) is used to define the paramount concern, residence, in the same sense that the G-4 alien definition was originally used in *Elkins* v. *Moreno*, 435 U.S. 647, 659, n. 8 (1978), to determine residence. Compare *Toll* v. *Moreno*, 441 U.S. 458, 461-462 (1979), where the State "clarified" the intent of its definition to deny in-state tuition to G-4 aliens for reasons other than lack of residence. See also *Toll* v. *Moreno*, 458 U.S. 1 (1982). If Defendants' claim that they are not trying to determine residence, but are applying a distinct and independent requirement of proper motive for school eligibility, that requirement is impermissible. The right to establish residence in a state and enjoy the benefits of residence may not be conditioned on a showing of proper motive. *Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969). See Section II, supra, pp. 18-24.

[37] An appeal to the school board is available to children excluded from school pursuant to Section 21.031(d). See *Def. Exh.* 4. However, the only issue considered by the board is the accuracy of the characterizatrion of the child's motive. If the board concludes that the child is living in the district primarily for the purpose of attending

As described in Section I of this brief, pp. 10-13, indigent children presumed to be non-residents are absolutely deprived of the benefit of public education as a result of this irrebuttable presumption of non-residence.

The district court upheld this tragic result because, in its opinion, the presumption that children who desire to attend school lack the permanence to be residents is necessarily and universally true. However, as discussed above in Section III. A., *supra*, pp. 32-36, that conclusion is erroneous. Permanence or intent to remain is not required to establish school residence in Texas. Therefore, the presumption, even if true, is irrelevant to the determination of school residence. In addition, the purpose of attending school is entirely consistent with an intent to remain in a place and make it one's home. *Shapiro*, 394 U.S. at 632.

Thus, while Texas purports to be concerned with residence, the presumption in Section 21.031(d) brings into the consideration of residence an element—motive—totally extraneous to the concept of school residence applied by Texas. Motive indicates nothing whatsoever about school residence. It is, therefore, not only an invalid basis for presuming non-residence, it is a wholly irrational basis.

Reasonable, less restrictive alternatives for determining the crucial question of residence are readily available to the State. *Supra*, pp. 36-38. But Tex.Educ.Code § 21.031(d) forecloses all such alternatives. By conclusively presuming that motive establishes non-residence the Texas statute deprives Plaintiff of one of the most important benefits of residence—public

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school, then other evidence of the *bona fides* of his residence remains irrelevant. Cf. *Bell* v. *Burson*, 402 U.S. 535, 540-542 (1971); *Elkins* v. *Moreno*, 435 U.S. at 600, n. 11. Plaintiff appealed to the McAllen school board after he had been living in McAllen for more than six months. [*Plf. Exh.* 8-95 to 98]. The Board found that he had the prohibited motive and upheld the decision to deny him free admission to school.

education—without the slightest consideration of the evidence of his residence. Because the consequences of denying children access to education are so grave, and because less restrictive alternatives are available, the use of an arbitrary presumption to determine Plaintiff's residence does not comport with due process. *Vlandis*, 412 U.S. 441. What this Court said in *Stanley* v. *Illinois*, 405 U.S. 645, 657 (1972) is equally applicable in this case:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues . . . , when it explicitly disdains present realities . . . , it needlessly risks running roughshod over the interests of . . . the child. It therefore cannot stand.

Id. at 657.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

JAMES A. HERRMANN
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
305 E. Jackson, Suite 206
Harlingen, Texas 78550
512/423-3111
Counsel Of Record For Petitioners

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
Box 2223 Hereford, Texas
806/364-3961

Respondent's Brief

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IN THE
SUPREME COURT OF THE UNITED STATES
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NO. 81-857

ORALIA MARTINEZ, as next friend of ROBERTO MORALES,
Petitioners,

v.

RAYMON L. BYNUM, as Texas Commissioner of Education; THE TEXAS EDUCATION AGENCY; McALLEN INDEPENDENT SCHOOL DISTRICT; and RODNEY CATHEY, as Superintendent of McALLEN INDEPENDENT SCHOOL DISTRICT,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

TRAVIS HIESTER
ATLAS & HALL
P.O. Drawer 3725
McAllen, Texas 78501

(512) 682-5501
Attorneys for Respondents Rodney Cathey and McAllen Independent School District

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

C. ED DAVIS
Chief, State and County Affairs

RICHARD L. ARNETT
Special Assistant Attorney General
Deputy Commissioner for Legal Services
Texas Education Agency
201 East 11th Street
Austin, Texas 78701
(512) 475-3272

Attorneys for Respondents Raymon L. Bynum and Texas Education Agency

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Introduction 5
II. Historical Background 6
III. Current Statutes 9
IV. Interim Summary 12
V. Equal Protection of the Laws 13
A. The interest underlying Section 21.031(d) 14
B. Strict Scrutiny is not required by the "right to travel" cases 18
1) The motivational test of 21.031(d) is neither invalid nor does it require strict scrutiny 21
2) Petitioner's legislative motive arguments are weightless 24
C. An elevated standard of review of Section 21.031(d) is not supported by substantive due process authorities 26
D. Intermediate scrutiny is not implicated here by *Plyler v. Doe* 28
E. 21.031(d) easily satisfies the appropriate standard of review 29
VI. Due Process of Law 31

CONCLUSION 32

APPENDIX

Text of Texas Educ.Code §21.031(d) ..... App. 1
Statement of Amici Curiae ..... App. 2

INDEX OF AUTHORITIES

Cases	Page
Adams v. Funk, 250 N.E. 2d 619 (Ct.App. Ohio 1969)	9
Albach v. Odle, 531 F.2d 983 (10th Cir. 1976)	21, 30
Anderson v. Breithbarth, 245 N.W. 483 (N.D. 1932)	9,11
Andre v. Bd of Trustees, 561 F.2d 48 (7th Cir. 1977), cert. denied 434 U.S. 1013 (1978)	19
Arredondo v. Brockette, 648 F.2d 425 (5th Cir. 1981)	14,24,25,31
Board of Ed. v. Foster, 76 S.W. 354 (Ky. 1903)	9
Board of Ed. of Union Free Sch. Dist. No. 2 v. Crill, 134 N.Y.S. 311 (Sup.Ct. N.Y. 1912)	9
Board of Trustees v. Powell, 140 S.W. 67 (Ky. 1911)	8,10
Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980)	26
Califano v. Aznavorian, 439 U.S. 174 (1978)	20,26
Califano v. Torres, 435 U.S. 1 (1978)	20
Chapp v. High School Dist. No. 1, 574 P.2d 493 (Ct.App. Ariz. 1978)	9
Cline v. Knight, 137 P.2d 680 (Colo. 1943)	8
Crawford v. Bd. of Ed., 102 S.Ct. 3211 (1982)	25,26

Dillam v. Cumberland Valley School District, 391 F.Supp. 358 (M.D. Pa. 1975) 21,30

Dandridge v. Williams, 397 U.S. 471 (1970) 30

DeLeon v. Harlingen C.I.S.D., 552 S.W. 2d 922 (Tex.Civ.App.—Corpus Christi 1977, no writ) 6,12

Delgado v. Immigration and Naturalization Service, 637 F.2d 762 (10th Cir. 1980) *28*

Drayton v. Baron, 276 N.Y.S. 2d 924 (Sup.Ct. N.Y. 1967) 9,12

Dunn v. Blumstein, 405 U.S. 330 (1972) 14,18,19

East Texas Guidance and Achievement Center, Inc. v. Brockette, 431 F.Supp. 231 (E.D. Tex. 1977) 14

Elkins v. Moreno, 435 U.S. 647 (1977) 23,31

Ensminger v. C.I.R., 610 F.2d 189 (4th Cir. 1979), cert. denied 446 U.S. 941 (1979) 28

Evansville Airport v. Delta Airlines, 405 U.S. 707 (1972) *21*

Fisher v. Reisner, 610 F.2d 629 (9th Cir. 1979) cert. denied 447 U.S. 930 (1980) 20

Gaddis v. Wyman, 304 F.Supp. 717 (S.D. N.Y. 1969) aff'd. 397 U.S. 49 (1970) 21,22,23

Grand Lodge v. Bd. of Ed., 110 S.E. 440 (W.Va. 1922) 9

Harris v. McRae, 448 U.S. 297 (1980) 27

Haverhill v. Gale, 103 Mass. 104 (1869) 8

Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974), cert. denied 420 U.S. 928 (1975) 20

Herscher Comm. Unit Sch. Dist. No. 2 v. Kankahee Sch. Dist. No. 111, 422 N.E. 2d 273 (Ill.App. 1981) 9,12

Hooban v. Boling, 503 F.2d 648 (6th Cir. 1974) 23

Horowitz v. Bd. of Ed., 216 N.Y.S. 646 (Sup.Ct. N.Y. 1926) 9

Huffman v. Montana Sup.Ct., 372 F.Supp. 1175 (D.Mont. 1974) (3 jd.ct.) 20

Illinois v. Bd. of Ed., 26 Ill. App. 476 (1888) 16

In Re: Disalvo, 227 N.E. 2d 441 (Prob. Ct. Ohio 1967) 9

In Re: Montgomery, 10 D.C. 3d 439 (Mont.County D.C. Pa. 1979) 9

In Re: U.S. Ex Rel. Missouri State High School Activities Association, 682 F.2d 147 (8th Cir. 1982) 21,30

Jackson v. Waco I.S.D., 629 S.W.2d 201 (Tex.Civ.App.—Waco 1982, writ ref'd n.r.e.) 15

Kelm v. Carlson, 473 F.2d 1267 (6th Cir. 1973) 23

Kulovitz v. Illinois High School Association, 462 F.Supp. 875 (N.D. Ill. 1978) 21,30

Lamar v. Micou, 112 U.S. 452 (1884) 7

Lewis v. Holden, 99 A.2d 758 (Vt. 1953) 9, 32

Luoma v. Union Sch. Dist. of Keene, 214 A. 2d 120 (N.H. 1965) 9

Mansfield Twp. Bd. of Ed. v. State Bd. of Ed., 129 A. 765 (N.J. 1925) 8

May v. Anderson, 345 U.S. 528 (1953) 21, 23

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 4,13,18,19,20

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) 21

Milliken v. Bradley, 418 U.S. 717 (1974) 17

Mobile v. Bolden, 446 U.S. 55 (1980) 26

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 5,27,28

McCarthy v. Philadelphia Civil Service Comm., *424 U.S. 645 (1976)* *13,20*

McCowan v. Maryland, 366 U.S. 420 (1961) 30

Nelson v. Tuscarora Int. Unit No. 11, 426 A.2d 1234 (Comm. Ct. Pa. 1981) 9

New York v. Ferber, 102 S.Ct. 3348 (1982) 22

Palmer v. Thompson, 403 U.S. 217 (1971) 25,26

Peterson v. School Bd., 236 P. 670 (Mont. 1925) 8,10

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 27

Planned Parenthood of Minnesota v. State of Minnesota, 612 F.2d 359 (8th Cir. 1980), *aff'd.* 448 U.S. 901 (1980) 27

Plyler v. Doe, 102 S.Ct. 2382 (1982) 7,13,22,28,31

Rogers v. Herman Lodge, 102 S.Ct. 3272 (1982) 26

San Antonio I.S.D. v. Rodriguez, 411 U.S. 1 (1973) 17,30

School District No. 1 v. Bragdon, 23 N.H. 507 (1851) 2,7,8,11,12,24

School Dist. No. 1 v. Sch. Dist. No. 1 of Custer TP, 211 N.W. 60 (Mich. 1926) 8

School Dist. No. 3 of Maricopa County v. Dailey, 471 P.2d 736 (Ariz. 1970 10

Shapiro v. Thompson, 394 U.S. 618 (1969) 18,19,2021,22,23

Shaw v. Small, 125 A 496 (Me. 1924) 9

Smith v. Ansley, 257 S.W.2d 156 (Tex.Civ. App.—Waco 1953, writ ref'd n.r.e.) 22

Smith v. Binford, 256 P.366 (Ida. 1927) 9

Smith v. Bd. of Ed., 71 N.W.123 (Wis. 1897) 8,12

Sosna v. Iowa, 419 U.S. 393 (1975) 21,23

Spriggs v. Altheimer, 385 F.2d 254 (8th Cir. 1967) 8,10,23

Starns v. Malkerson, 326 F.Supp. 234 (D.Minn. 1970), *aff'd.* 401 U.S. 985 (1971) 21,24

State v. Clymer, 147 S.W.1119 (Ct.App. Mo. 1912) 8

State v. Sch. Dist. No. 12, 18 P.2d 1010 (Wyo. 1933) 9,12

State v. Selleck, 107 N.W. 1022 (Neb. 1906) 9

State v. Thayer, 41 N.W. 1014 (Wisc. 1889) 8

Sturgis v. State of Washington, 368 F.Supp. 38 (W.D.Wash. 1973) *aff'd.* 414 U.S. 1057 (1973) 21

Sulzen v. Sch. Dist. No. 36, 62 P.2d 880 (Kan. 1936) 9

The Venus, 8 Cranch 253 (1814) 7,23

Toomer v. Witsell, 334 U.S. 385 (1948) 15

Town of Madison v. Conn. St. Bd. of Ed., Court of Common Pleas, New Haven County, Nov. 18, 1977 11

Truax v. Raich, 239 U.S. 33 (1915) 20

Turner v. Bd. of Ed., 294 N.E. 2d 264 (Ill. 1973) 8

U.S. v. O'Brien, 391 U.S. 367 (1968) 26

Valley v. Rapides Parish School Board, 646 F.2d 925 (5th Cir. 1981), cert. denied, 102 S.Ct. 1430 (1982) 15

Vlandis v. Kline, 412 U.S. 441 (1973) 14,23

Washington v. Davis, 426 U.S. 229 (1976) 19

Weinberger v. Salfi, 422 U.S. 749 (1975) 24,32

Wheeler v. Burrow, 18 Ind. 14 (1862) 8

White v. Bickford, 244 S.W. 49 (Tenn. 1922) 9,12

Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975) 19

Yale v. West Middle School District, 59 Conn. 489 (1890) 8

Yarborough v. Yarborough, 290 U.S. 202 (1933) 7

Zobel v. Williams, 102 S.Ct. 2309 (1982) 13,21,24

CONSTITUTIONS

U.S. Const.

First Amendment 2

Fourteenth Amendment ..... *passim*

Art. IV, §2 2

STATUTES

20 U.S.C. §2735 16

ALA.CODE tit. 16 §11-16 12

ALASKA STAT. §14.03.080 12

ARIZ.REV.STAT.ANN. §15-824(B) (Supp. 1981) 10

ARK.STAT.ANN. §80-1501 (Supp. 1981) 10

CAL.EDUC.CODE §48200 (West 1978) 10

CAL.WELF. & INST. CODE §17.1 (West.Supp. 1982) 10

COLO.REV.STAT. §22-1-102(g) 11

CONN.GEN.STAT. §10-253(c) 2(d) (1982 Supp.) 11

DEL.CODE ANN. tit. 14 §202(e) 10

IDAHO CODE §33-1401(2) 10

ILL.REV.STAT. ch. 122 §10-20.12 12

IND.CODE ANN. §20-9.1 - 6.1 - 1(c) (Burns Supp. 1979) 11

IOWA CODE §282.1 (Supp. 1982) 12

KAN.STAT.ANN. §72-1046 (Supp. 1981) 10

KY.REV.STAT. § 158.120 10

MASS.ANN.LAWS Ch. 76 §6 (Law Coop. 1978) 11

ME.REV.STAT. tit 20 §859(3)(B)(2) (Supp. 1982) 11

MICH.COMP. LAWS §380.1148 (Supp. 1982) 11

MISS.CODE ANN. §37-15-29 12

MO.REV.STAT. §167.151 11

MONT.CODE ANN. tit. 20 §5-101(1)(b) 10

MONT.CODE ANN. tit 1 §1-215 (4)(5) 10

NEB.REV.STAT. §43-645(4) 10

NEB.REV.STAT. §79-445 10

NEV.REV.STAT. §392.010 12

N.H.REV.STAT.ANN. §189:1a 11

N.H.REV.STAT.ANN. §193:12 11

N.H.REV.STAT.ANN. §193:28 11

N.J.STAT.ANN. §18A:38-1(b)(1981) (Supp.) 11

N.M.STAT.ANN. §22-1-4 12

N.Y.EDUC.LAW §3202(7-a) (McKinney Supp. 1982) 10

N.Y.EDUC.LAW §3202 (McKinney) 12

N.C.GEN.STAT. §115C-366 (Supp. 1981) 10

N.D.CENT.CODE §54-01-26 11

OHIO REV.CODE ANN. §3313.64(b)(1) 10

OKLA.STAT.ANN. tit. 70 §1-113 11

OREG.REV.STAT. §332.595(5) 11

P.A.CONS.STAT.ANN. tit. 24 §13-1302 (Supp. 1981) 11

S.C.CODE §59-63-30 10

S.D.COMPILED LAWS ANN. §13-28-9 (Supp. 1981) 10

TENN.CODE ANN. § 49-1701 12

TEXAS EDUC.CODE § 11.13 32

TEXAS EDUC.CODE § 16.102 17

TEXAS EDUC.CODE §16.176 16

TEXAS EDUC.CODE §16.251 16

TEXAS EDUC.CODE §16.301 16

TEXAS EDUC.CODE §20.04(d) 16

TEXAS EDUC.CODE §21.031(c) 29

TEXAS EDUC.CODE §21.031(d) ..... *passim*

General and Special Laws of Texas, 65th Leg., p. 1012 ch. 376 (1977) 6

General and Special Laws of Texas, 67th Leg., 1981, ch. 875, p. 3626 16

UTAH CODE ANN. §53-6-23 12

VA.CODE §22.1-3 (Supp. 1982) 10

VT.STAT.ANN. tit. 16 §1075(a) (Supp. 1982) 10

WISC.STAT. §121.77 12

WYO.STAT.§21-4-301 12

REGULATION

34 C.F.R. 300.226 16

OTHER

83 ALR 2d 497 8

3 Am. and Engl. Ann. Cases 692 (1906) 8

26 Lawyers Reports Annotated 581 (1895) 8

Kentucky Att.Gen.Op. 78-64 (1978) 10

1933 Ohio, Att.Gen.Op. 2045 (1933) 10

Tex.Att.Gen.Op. H-63 (1973) 6

IN THE
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On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

In 1977 the Texas Legislature codified Texas common law of at least 72 years' tradition by enacting Section 21.031(d) of the Texas Education Code. Previous Texas statutory law had conditioned a child's entitlement to admission to public school on a child's residence in a Texas school district; however, commencing in 1905, the Attorney General of Texas and the courts thereof had ruled that a child did not acquire a residence for school

purposes separate and apart from his parents or guardian if his presence in the school district was for the primary purpose of attending school. These rulings and the 1977 codification thereof reflected the common law of the United States as it had existed since 1851. *School District No. 1 v. Bragdon*, 23 N.H. 507 (1851).

A few months after the effective date of Section 21.031(d) Petitioner and several other Plaintiffs filed this action against the Commissioner of Education, the Texas Education Agency, and various local independent school districts and officers thereof. The initial complaint sought certification of a class of United States citizens who had come from outside the State of Texas in order to attend school and challenged the constitutionality of Section 21.031(d) of the Texas Education Code as applied to this class. Specific reference was made to the Privileges and Immunities Clause, the right to travel, the First Amendment, the Due Process Clause, the Equal Protection Clause, and to a purported disparate impact on persons of Mexican-American ancestry. Plaintiffs requested injunctive relief and a declaration that the statute was unconstitutional on its face or, in the alternative, as applied to Plaintiffs. (R.1-7).

Following the denial of two motions for preliminary injunctions and the filing of a third (R. 46-8, J.A. 19a, R. 56-62) Plaintiffs filed an amended petition substantially reducing the scope of their claims. J.A.3a. Deleted were the class allegations and all causes of action, including that concerning disparate racial impact, other than those based on the Privileges and Immunities Clause and the 14th Amendment as those provisions were implicated by the "right to travel" and an alleged "irrebuttable presumption." J.A. 6a-7a.

On December 19, 1979, the District Court issued its Findings of Fact and Conclusions of Law and entered

judgment in favor of Defendants. J.A. 21a, 41a. The Court found, on the basis of an agreement on the record (Tr. p. 12), that the "parties have specifically limited this case to the issue of the facial constitutionality of . . . § 21.031(d)." J.A. 27a, no. 40. The district court further found that Petitioner lived in McAllen Independent School District for the primary purpose of education, that he intended to remain only until he completed his education, and that he was attending school pursuant to a bond securing his tuition. J.A. 22a-24a. nos. 3, 10, 15.

With regard to the need for Section 21.031(d), the district court, based upon what was stipulated to be the testimony of various superintendents (J.A. 63a *et seq.*), concluded that in the absense of the statutory restriction thousands of children would enter Texas without their parents to attend school and that substantial intra-district transfers would result. The Court found that recruitment of athletes would possibly be encouraged and that "fluctuating school populations would make it impossible to predict enrollment figures" and result in overcrowded classrooms and overburdened programs. After further noting that most of the children in Petitioner's category do not contribute to the support of schools and that their education would be financed by the resident taxpayers of the State and local districts, the court found as follows:

> The intrastate and interstate transfers would, in all probability, have a detrimental effect on the educational standards of the . . . school districts in the State of Texas.

J.A. 25a-26a. Finally, the court determined that the statute was enacted to provide "a statutory guideline to follow in determining a genuine *bona fide* resident" and noted that the Defendant school districts had been "most liberal" in admitting children to school under the statutory provision. J.A. 27a.

While Petitioner throughout his Brief attacks the manner in which the statute is applied by the districts generally and to children of his situation specifically, he voluntarily limited this action to the facial constitutionality of the statute and should not be permitted to modify this basic restriction on appeal. The question before the Court is whether the statute should be invalidated for all applications in all circumstances. Our response to contentions relating to the constitutionality of the statute as applied should not be deemed a concession that those issues are properly before this Court.

SUMMARY OF ARGUMENT

Indelible features of American democracy and its organization into different levels of government are the concepts of residency and domicile. The nation, states, and local political subdivisions exist for their residents. In the context of education this principle long ago gave rise to a requirement that children seeking tuition free admission to public school be *bona fide* residents of the particular school district, that is, reside in the district for a primary purpose other than education.

Such *bona fide* residency requirements have never been questioned by this Court. *E.g. Memorial Hospital v. Maricopa County,* 415 U.S. 250, 260 n. 15 (1974). Probably because of the uniformity of their application, they do not represent the types of classifications that have been viewed with suspicion and subjected to heightened standards of review. Texas' *bona fide* residency requirement does not impact or penalize interstate travel as did the durational requirements in the "right to travel" cases. It is relatively lenient in permitting children to attend school in a district other than their parents' residence so long as a child's presence is for other than school purposes. Thus Section 21.031(d) supports *bona fide* alternate living arrangements rather than prohibits same and the principles of substantive

due process set forth in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), do not render its classifications suspect. Nor does the statute operate to deny innocent children of an education and thereby implicate any intermediate level of scrutiny.

While the statute should be reviewed under the rational basis test, the interests underlying Texas' residency system are sufficent to withstand any level of review short of blind condemnation. As with any residency requirement, the common law system utilized in Texas is designed to insure a reasonable nexus between children and the school district they desire to attend. Among other desireable effects, such a nexus promotes local responsibility and participation in local schools and maintains the incentive of local voters to enrich the basic education ensured by the state's school finance system.

Residency requirements are particularly necessary in the area of public education. If parents with the financial or social means could send their children to whichever school district desired, large scale district hopping could be anticipated. Evasion of desegregation efforts, program raiding, and atheletic imbalance would be a few predictable results. With the yearly cost of education for some handicapped children running into six figures, school districts and states would be encouraged to arrange for their students and wards to "reside" in another district or state. The consequence of the "*de facto*" residency system sought by Petitioner would be disruption of public education.

ARGUMENT

I. INTRODUCTION

The primary issue before the Court is whether the classic American common law definition of bona fide

residency for school purposes offends the United States Constitution. While Section 21.031(d) of the Texas Education Code was enacted in 1977, the statute merely codified the law in Texas concerning school residence as it had existed at least since 1905.

> '[R]esidence' . . . has received a particular interpretation for school purposes since 1905 when, in an opinion to the then State Superintendent of Public Instruction, the Attorney General said:
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> > 'If the children have merely an ostensible and not a substantial residence in the district, if they were sent to Rockdale for the sole purpose, or even the main purpose, of participating in the advantages of the public schools of Rockdale, they are not entitled to free tuition.'

Texas Attorney General Opinion H-63 (1973). (Reprinted in Reply of Respondents to Petition for Writ of Certiorari, App. p. 1). The Texas rule[1] was anything but unique; it tracked the general common law of the nation.

II. HISTORICAL BACKGROUND

A review of legal history conclusively demonstrates that Section 21.031(d) and the common law it codified are "established criteria for determining residence."

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1. The rule of Texas common law codified in § 21.031(d) was relied upon in *DeLeon v. Harlingen Consolidated Independent School District*, 552 S.W.2d 922 (Tex.Civ.App. — Corpus Christi 1977, no writ), citing A.G.Op. H-63. *DeLeon* was handed down one day before § 21.031(d) was signed into law by the Governor and over two months before its effective date. General and Special Laws of Texas, 65th Leg., p. 1012, ch. 376 (1977).

Plyler v. Doe, 102 S.Ct. 2382, 2400 n. 22 (1982). Residence being next of kin to domicile, it is not unreasonable to assume that the qualification concerning the purpose underlying a child's residence was developed as a corollary to ancient domicile law. As Chief Justice Marshall noted in his dissent in *The Venus*, 8 Cranch 253, 278 (1814),

> The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode.

He further noted that the intent must be "*bona fide.*" *Id.* at 281.

The first discussion of this "special purpose" doctrine with regard to school residence was contained in what appears to have been the first school residence case in the United States. *School District No. 1 v. Bragdon*, 23 N.H. 507 (1851), involved a statute which provided for tuition free education in the district of a student's residence. While not restricting the children's residence to that of their parents[2], the court affirmed a jury instruction which stated:

> If it appeared that they had taken up such residence for the purpose of going to school, it was a fraud upon the district, and did not entitle them to attend the school . . . . No persons have the right to receive children into their family for the purpose of sending them to school in their district.

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2. *See Lamar v. Micou*, 112 U.S. 452, 470 (1884), stating that "an infant cannot change his own domicile," which is that of his or her parents. *See also Yarborough v. Yarborough*, 290 U.S. 202, 211 (1933).

Id. at 510. Noting that the children in question had an "ostensible and not a substantial residence in the district," *Id.* at 516, the Court upheld their exclusion although there was no doubt that they actually lived with their uncle in the district.

Other courts in the late 19th century agreed that the general rule that a child's residence was that of his or her parents must admit of exceptions in the context of school residency due to the harsh results which would otherwise obtain when children were forced by economic distress to live apart from their parents. The exceptions were uniformly qualified, however, by the special purpose doctrine and children were admitted only when they "did not come into the district for the purpose of obtaining instruction in its schools." *Yale v. West Middle School Dist.*, 59 Conn. 489, 491 (1890); *State v. Thayer*, 41 N.W. 1014, 1017 (Wis. 1889); *Haverhill v. Gale*, 103 Mass. 104, 105, n. (1869); *Wheeler v. Burrow*, 18 Ind. 14, 17 (1862). *See* 26 Lawyers Reports Annotated 581 (1895); 3 Am. and Engl. Ann. Cases 692 (1906).[3]

With few exceptions, the courts of this nation have either adhered to the special purpose doctrine[4] or more

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3. *See also Smith v. Bd. of Ed.*, 71 N.W. 123 (Wis. 1897), in which an instruction regarding "sole purpose" was reversed in favor of the "primary purpose" standard.

4. 83 ALR 2d 497, 499; *Spriggs v. Altheimer*, 385 F.2d 254 (8th Cir. 1967); *Cline v. Knight*, 137 P. 2nd 680, 684 (Colo. 1943); *Turner v. Bd. of Ed.*, 294 N.E.2d 264 (Ill. 1973) (rule applied even where guardian appointed); *Bd. of Trustees v. Powell*, 140 S.W. 67 (Ky. 1911); *Sch. Dist. No. 1 v. Sch. Dist. No. 1 of Custer TP*, 211 N.W. 60, 62 (Mich. 1926); *State v. Clymer*, 147 S.W. 1119, 1121 (Ct.App.Mo. 1912); *Peterson v. School Bd.*, 236 P. 670 (Mont. 1925); *Mansfield Twp. Bd. of Ed. v. State Bd. of Ed.*, 129 A. 765, 766-67 (N.J. 1925);

(footnote continued on following page)

tightly restricted tuition free admission to children whose parents or guardians reside in the school district[5], some courts even questioning the *bona fides* of the parental residence.[6]

III. CURRENT STATUTES

The statutory law of the various states contain numerous minor variations but can generally be separated into three indistinct groups. The largest group of states have tightened the common law and provide for free admission only in the district where a

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(footnote continued from previous page)

Luoma v. Union Sch. Dist. of Keene, 214 A. 2d 120 (N.H. 1965); *Drayton v. Baron*, 276 N.Y.S. 2d 924, 926 (Sup. Ct. N.Y. 1967); *Grand Lodge v. Bd. of Ed.*, 110 S.E. 440 (W.Va. 1922); *State v. Sch. Dist. No. 12*, 18 P.2d 1010, 1013 (Wyo. 1933); *See In re Disalvo*, 227 N.E. 2d 441 (Prob.Ct. Ohio 1967) (denying guardianship sought for school residency purposes); *In re Montgomery*, 10 D. & C. 3d 439 (Mont.Cty. D.C. Pa. 1979)(vacating guardianship); *Anderson V. Breithbarth*, 245 N.W. 483, 489 (N.D. 1932).

5. *Chapp v. High School Dist. No. 1*, 574 P.2d 493 (Ct.App. Ariz. 1978); *Smith v. Binford*, 256 P. 366 (Ida. 1927); *Sulzen v. Sch. Dist. No. 36*, 62 P.2d 880 (Kan. 1936); Bd. of Ed. v. Foster, 76 S.W. 354 (Ky. 1903); *Shaw v. Small*, 125 A. 496 (Me. 1924); *Horowitz v. Bd. of Ed.*, 216 N.Y.S. 646 (Sup.Ct. N.Y. 1926); *Adams v. Funk*, 250 N.E. 2d 619 (Ct.App. Ohio 1969); *Nelson v. Tuscarora Int. Unit No. 11*, 426 A. 2d 1234 (Comm. Ct. Pa. 1981); *White v. Bickford*, 244 S.W. 49 (Tenn. 1922); *Lewis v. Holden*, 99 A. 2d 758 (Vt. 1953); *See Herscher Comm. Unit Sch. Dist. No. 2 v. Kankahee Sch. Dist. No. 111*, 422 N.E. 2d 273 (Ill.App. 1981) (strong presumption that child's residence that of parent; not rebutted by mere presence of child elsewhere).

6. *State v. Selleck*, 107 N.W. 1022 (Neb. 1906); *Bd. of Ed. of Union Free Sch. Dist. No. 2 v. Crill*, 134 N.Y.S. 311 (Sup.Ct. N.Y. 1912); *See Lewis v. Holden, supra* (change in legal custody for purpose of school residence ineffective for school attendance.

child's parent or guardian resides.[7] Some of these states continue to utilize the special purpose doctrine in specific contexts[8], and several formerly recognized exceptions to the general rule that a child's residence is that of the parents but subjected those exceptions to the special purpose doctrine.[9] Many of these states have only recently amended their statutes to these more restric-

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7. ARIZ.REV.STAT.ANN. § 15-824(B)(Supp. 1981); ARK.STAT.ANN. § 80-1501 (Supp. 1981); CAL.EDUC.CODE § 48200 (West 1978), referencing CAL.WELF. & INST.CODE § 17.1 (West Supp. 1982); DEL.CODE ANN. tit. 14 §202(e); IDAHO CODE § 33-1401 (2); KAN.STAT.ANN. § 72-1046 (Supp. 1981); KY.REV.STAT. § 158.120; MONT.CODE ANN. tit. 20 § 5-101(1)(b), (children who reside in the district), tit. 1 § 1-215(4), (5) (residence of child is that of the parents); N.C.GEN.STAT. § 115C-366 (Supp. 1981) (domicile of child and parent or guardian); OHIO REV.CODE ANN. § 3313.64(b)(1); S.C.CODE § 59-63-30; S.D.COMPILED LAWS ANN. § 13-28-9 (Supp. 1981); VT.STAT.ANN. tit. 16 § 1075(a)(Supp. 1982); VA.CODE § 22.1-3 (Supp. 1982). *See* NEB.REV.STAT. § 43-645(4) (applying to handicapped childern), and § 79-445 (implying the same rule for all children); N.Y.EDUC.LAW § 3202(7-a) (McKinney Supp. 1982) (applying to children in hospitals or other institutions).

8. *School Dist. No. 3 of Maricopa County v. Dailey*, 471 P.2d 736 (Ariz. 1970) (excludes children living with guardian obtained for purpose of school attendance); S.D.COMPILED LAWS ANN. § 13-28-9 (applying doctrine to residence of parent or guardian); VA.CODE § 22.1-3 (Supp. 1982) (applying doctrine to emancipated minors and minors living with guardians); KY.REV.STAT. § 158.120 (tuition if parent or guardian not a *bona fide* resident).

9. *Kentucky, Bd. of Trustees v. Powell, supra;* Att.Gen.Op. 78-64 (1978); *Montana, Peterson v. School Bd., supra:* Ohio, 1933 Ohio Att.Gen. 2045 (1933); Arkansas, *See Spriggs v. Altheimer, supra,* (applying statute requiring only residence of a child).

tive residency requirements;[10] thus apparently the need to protect school districts is growing.

The next major group of states are less restrictive, having statutes which permit free admission of children who reside apart from their parents or guardian, expressly subject to the special purpose doctrine.[11] It is this group to which Texas belongs and this context in which the instant case arises. A related set of statutes are to similar effect, merely adopting different qualifications for *bona fide* residence of a child.[12]

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10. Arkansas changed from residence of the child in 1981 as did California in 1977 and Kentucky in 1978. North Carolina changed the statutory terms from residency to domicile in 1981. South Dakota removed children residing with a person "*in loco parentis*" from the eligible class in 1981; Kansas also moved to a more restrictive statute in 1981.

11. IND.CODE ANN. § 20-8.1—6.1—1(c) (Burns Supp. 1979); ME.REV.STAT. tit. 20 § 859(3)(B)(2) (Supp. 1982) (also requiring extenuating circumstances justifying residence apart from parent or guardian); MASS.ANN.LAWS Ch. 76 § 6 (Law Coop. 1978); MICH.COMP. LAWS § 380.1148 (Supp. 1982) (only in home of relatives); OREG.REV.STAT. § 332.595(5); N.H.REV. STAT.ANN. § 193:28 (Supp. 1981) (applying to children in childcare institutions), § 193:12, § 189: 1-a *with School Dist. No. 1 v. Bragdon, supra;* N.D.CENT.CODE § 54-01-26 *with Anderson v. Breithbarth, supra.*

12. CONN.GEN.STAT. § 10-253(c) 2(d)(Supp. 1982); N.J.STAT. ANN. § 18A:38-1(b) (Supp. 1981); PA.CONS.STAT.ANN. tit. 24 § 13-1302 (Supp. 1981) (all requiring essentially that residence be permanent or beyond school term and without pay). One factor considered in Connecticut is whether the purpose of residence was to attend school. *Town of Madison v. Conn. St. Bd. of Ed.*, Court of Common Pleas, New Haven County, Nov. 18, 1977 (unreported). MO.REV.STAT. § 167.151 (parents cannot contribute to support); COLO.REV.STAT. § 22-1-102(g)(intent to remain indefinitely); OKLA.STAT.ANN. tit. 70 § 1-113 (living with person having care and custody who contributes in major degree to support) (*See* annotated 1953 Educ.Dept. ruling utilizing special purpose doctrine).

The statutes of the third set of states refer to the residence of a child without further elaboration.[13] It is not unlikely that the courts of most of these states would utilize the established approach to such statutes, that is, presume that the residence of a child is that of his parents and qualify any exceptions thereto with the special purpose doctrine. *E.g. DeLeon v. Harlingen Consol. Ind. Sch. Dist.supra; School Dist. No. 1 v. Bragdon, supra.* Indeed, several of these states have decisions to that or similar effect.[14]

IV. INTERIM SUMMARY

It may safely be stated that the area of residence for school purposes has received a great deal of judicial and legislative attention since the New Hampshire Supreme Court first blazed a trail 131 years ago. While the weight of authority established the right of a child to attend school in a district in which he resided apart from his parents or guardian so long as his residence was not primarily for school purposes, numerous states have adopted a more restrictive view. Texas is *not* among these states; we have maintained the view that there are circumstances where children unfortunately *must* live apart from their parents and have entitled those children to free admission to the schools of the district in which they actually live. Texas, as well as nearly every

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13. ALASKA STAT. § 14.03.080; IOWA CODE § 282.1 (Supp. 1982); MISS. CODE ANN. § 37-15-29; NEV.REV.STAT. § 392.010; N.M.STAT.ANN. § 22-1-4; N.Y.EDUC.LAW § 3202 (McKinney); TENN.CODE ANN. § 49-1701; UTAH CODE ANN. § 53-6-23; WISC.STAT. § 121.77; WYO.STAT. § 21-4-301; See ALA. CODE tit. 16 § 11-16 ("*bona fide* residents"); ILL.REV.STAT. ch. 122 § 10-20.12 (persons in the district).

14. *Ill., Herscher C.U. Sch. Dist. v. Kankahee Sch. Dist. No. 111, supra: N.Y., Drayton v. Baron, supra; Tenn., White v. Bickford, supra: Wis., Smith v. Bd. of Ed., supra; Wyo., State v. Sch. Dist. No. 12, supra.*

other state which has maintained the more liberal approach, has restricted what would otherwise be a free flow of students across district lines with a requirement that the students' residence be *bona fide*. Section 21.031(d) merely codified the traditional definition of *bona fide* residence for school purposes. It remains to ascertain whether that codification and the underlying 131 years of American common law offend the United States Constitution.

V. EQUAL PROTECTION OF THE LAWS

Petitioner's assertions concerning the right to travel and the Equal Protection Clause of the 14th Amendment may be viewed together, for "right to travel analysis refers to little more than a particular application of equal protection analysis." *Zobel v. Williams*, 102 S.Ct. 2309, 2313 n.6 (1982). The classifications created by Section 21.031 regard whether a child lives with his or her parent or guardian and the purpose for the presence of a child who does not. The second classification is pertinent only due to the permissive nature of Section 21.031(d) which allows rebuttal of the common law presumption that a child's residence is that of his or her parents or guardian. Certainly if Texas relatively liberal *bona fide* residence requirement is unconstitutional then so are the equally or more restrictive school residency requirements of nearly every other state in the country.

No authority of this Court reaches so far; only a marked expansion of equal protection law can condemn Section 21.031(d). The constitutionality of reasonable *bona fide* residency requirements has never been questioned. *See Plyler v. Doe, supra* at 2400 n. 22; *Zobel v. Williams, supra* at 2315 n.13; *McCarthy v. Philadelphia Civil Service Comm.*, 424 U.S. 645 (1976); *Memorial Hospital v.*

Maricopa County, supra, at 260 n. 15; *Vlandis v. Kline,* 412 U.S. 441, 452-54 (1973); *Dunn v. Blumstein,* 405 U.S. 330, 343 (1972).

A. The interest underlying Section 21.031(d)

The Court of Appeals found it unnecessary to decide which standard of review was applicable to Section 21.031(d) for it viewed the interests asserted in support thereof to be compelling. Quoting from the District Court's opinion, the Court of Appeals held:

> 'A state has a legitimate interest in protecting and preserving the quality of its educational system and the right of its own *bona fide* residents to attend state schools on a preferred tuition basis. *Vlandis v. Kline,* [*supra*]. Similarly, the state would have an interest in preserving the financial integrity of the various components of the state educational system, *i.e.,* the individual school districts. *East Texas Guidance and Achievement Center, Inc. v.Brockette,* 431 F.Supp. 231, 236 (E.D. Tex. 1977) . . . [T]he statute . . . even applies to attempted transfers between different school districts within the same county. The Court is satisfied that these kinds of transfers, free of all tuition, would cause budgetary and administrative planning problems sufficient to justify the tuition scheme of the statute.'

Arredonodo v. Brockette, 648 F.2d 425, 428 (5th Cir. 1981).

Not surprisingly, a doctrine which has endured so long in so many jurisdictions may be justified by other specific interests within the overarching basis recognized in Vlandis. One such interest in modern times is to

impede the evasion of desegregation efforts[15], for it hardly may be doubted that it is much less likely that an entire family would relocate for school purposes than would single children.[16]

The basic reason for any residency requirement is that persons should be members of a state or local polity in order to avail themselves of governmental services. The policy seemingly relates to the basic democratic concept of local voter control, current tax contributions and economic strength from local expenditures. *See Toomer v. Witsell*, 334 U.S. 385, 399 (1948). Texas' *bona fide* residence requirement tends to create a closer connection between school attendance and local economies and

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15. See Jackson v. Waco I.S.D., 629 S.W.2d 201 (Tex.Civ.App.—Waco 1982, writ ref'd. n.r.e.), wherein a district was permitted to apply a parents or guardians only rule and avoid the permissive 21.031(d) in order to prevent frustration of a federal desegregation order. *See also Valley v. Rapides Parish School Board*, 646 F.2d 925, 942-43 (5th Cir. 1981), cert. denied 102 S.Ct. 1430 (1982).

16. While Petitioner asserts that the wealthy can avoid the impact of 21.031(d) through guardianship proceedings, Brief of Petitioners, p. 44, the reality is that the wealthy would benefit most from the remedy sought, for they more likely could afford to maintain their children in a separate district primarily for school purposes. Petitioner's further suggestions that the estimated impact of a "*de facto*" residency system is overstated and that 90% of children who live with custodians do not do so for educational purposes are illogical. Brief for Petitioners pp. 36, 40. First, the 90% figure is based upon Plaintiff's Ex. 7, which Petitioner now renounces. *Id.* at 40 n. 31. Second, it is rather elementary that one cannot assess the number or percentage of children who would live with custodians for educational purposes with data gathered at a time when such purposes are frustrated by operation of law.

property values.[17] The system promotes balance in inter-district athletics and discourages recruitment of school-age athletes. Moreover, pupil assignment policies have long been viewed as necessary to prevent overcrowding. *Illinois v. Bd. of Ed.*, 26 Ill. App. 476 (1888).

A major interest promoted by Section 21.031(d) is local identity, responsibility, concern and participation in local schools.[18] Generally requiring parents to send

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17. Petitioner raises the outdated refrain concerning unequal school financing in Texas. Brief for Petitioners, pp. 43-44. In 1975 Texas rewrote its school finance laws to distribute state funds inversely to property value per student. Texas Educ. Code § 16.251. In 1979 the State added an equalization element which flows increased state funds on the same basis to districts with less that 110% of the average property value per student in the state, Texas Educ. Code § 16.301, up to a current maximum of $390.00 per child. General and Special Laws of Texas, 67th Leg., 1981, ch. 875, p. 3626. The State also operates a compensatory education program which distributed $50.6 million for the education of poor children in 1981-82. Texas. Educ.Code § 16.176; General and Special Laws of Texas, 67th Leg., 1981, ch. 875, p. 3626. Under this system some school districts receive only the state's constitutional fund, the Available School Fund, while others are largely financed through state statutory funds. The local contribution, or local fund assignment, is based on a tax rate of $. 15 per hundred dollar valuation as determined by the State Property Tax Board. General and Special laws of Texas, 67th Leg. ch. 875, p. 3626 no. 9. While the foundation program so funded constitutes an adequate basic system, voters of a district may authorize up to $1.50 per hundred tax rate for the operation of schools. Texas Educ. Code § 20.04(d). If the voters of a district do not wish to dedicate their resources to the enhancement of their schools, they should not be permitted to avail themselves of the local enrichment authorized by the voters of neighboring districts and supported by the taxpayers thereof merely because they desire to do so. Moreover, since a child residing with a custodian does not contribute to the resources of a district, J.A. 26a, no. 33, his attendance therein inevitable dilutes any local enrichment effort on the part of the *bona fide* residents of a district.

18. Parental involvement in local districts is not only a basic element of the democratic system, it also has been required in some contexts. 34 C.F.R. 300.226 (handicapped children); 20 U.S.C. § 2735 (repealed).

their children to their own district's schools obviously enhances their interest therein.

> [N]o single tradition in public education is more deeply rooted than local control over the operation of schools . . .

Milliken v. Bradley, 418 U.S. 717, 741-42 (1974); *See San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1 (1973). It cannot reasonably be questioned that this is largely due to the school district system and *bona fide* residency requirements.

Finally, unrestricted school attendance would wreak havoc on the financing of schools.[19] Since state and federal funds are almost invariably tied to enrollment, *e.g.* Texas Educ.Code §16.102, a district which lost significant numbers of students between school years would open its doors to find that it was contractually bound to employ teachers for which it would not be funded. Similarly, a district receiving an unexpected number of such students would have too few teachers and possibly inadequate facilities at a time when few teachers are available for employment and those that are have little to commend themselves. Quite simply, a quality school system requires planning; it is not run by the seat of one's pants.

The interests underlying Section 21.031 go to the heart of the school district system of education; thus the statute is necessary to promote a compelling state interest, maintaining the quality of public education. However, the authorities of this Court indicate that this

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19. Undoubtedly, other states could point to other interests promoted by the residency doctrines at issue here. One peripheral interest may be the removal of state created incentives for the destruction of family units.

bona fide residency requirement should be reviewed under the rational basis test.

B. Strict Scrutiny is not required by the "right to travel" cases.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Dunn v. Blumstein, supra, and Memorial Hospital v. Maricopa County, supra*, the Court applied strict scrutiny to durational residency requirements affecting fundamental rights or basic necessities of life. However, both *Dunn, supra* at 343, and *Memorial Hospital, supra* at 260, n. 15, expressly limited their scope to durational requirements as opposed to *bona fide* residency requirements. *See also, Shapiro v. Thompson, supra* at 636. *Dunn* explained that the impact on interstate travel which invoked strict scrutiny resulted from the *durational* requirement which affected "*only* those persons who have gone from one jurisdiction to another during the qualifying period." *Id.* at 338 (emphasis added). Durational requirements disparately, in fact exclusively, impact *new* residents. In contrast, Section 21.031(d), which has no durational component, applies equally to recent international travelers, interstate travelers, intrastate travelers and lifelong residents of a district, requiring that a child in any of these groups who lives apart from his parent or guardian be *present* in the district for a primary purpose other than education.

Petitioner's argument seems to be that 21.031(d) infringes upon the right to travel because more children who live apart from their parents have traveled to their present location than have been orphaned, had their parents move away, or otherwise reached their present living arrangement. Not only is there nothing in the

record to support this view,[20] even were it correct there would be no disparate impact in the constitutional sense. No case of this Court has implied that a neutral requirement applicable to all persons regardless of their itinerary caused a disparate impact because recent travelers were more likely to be affected. For example, would income limitations in *Shapiro* and *Maricopa County* have been subject to strict scrutiny if it had been shown that recent travelers were generally wealthier than others and hence unable to secure public assistance? In *Dunn* would a minimum voting age of 21 have been scrutinized strictly if it had been shown that interstate travelers were more likely to be under 21 than established residents? And the disparate impact in *Washington v. Davis,* 426 U.S. 229 (1976), may be contrasted with a situation where an employment test gave rise to equal results racially but impacted one race more heavily due to an increased application rate. In the constitutional sense, a disparate impact is that *produced* by operation of law or practice on a homogenous group, not that which results from operation of a neutral law or practice on different groups, one of which happens to be more often the subject thereof. Texas' residency system does not impose a "penalty" on interstate travel by disparately impacting recent immigrants. Thus strict scrutiny is not mandated by the "right to travel" cases.

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20. There has been no showing that, on a statewide basis, 21.031(d) disparately impacts international or interstate travelers. A review of the case law indicates that the issue arises much more often in the context of intrastate "district hopping." Considering the fact that only a minority of Texas' 1100 districts are in proximity to the state's borders it may reasonably be assumed that, to the extent that 21.031(d) affects travel, it primarily affects intrastate travel. According to Plaintiff's Ex. 7, of the five children rejected by McAllen I.S.D., two were Texas residents, two from Mexico, and one from Oklahoma. J.A. 61a. *See Andre v. Bd. of Trustees,* 561 F.2d 48 (7th Cir. 1977), *cert. denied* 434 U.S. 1013 (1978); *Wright v. City of Jackson,* 506 F.2d 900 (5th Cir. 1975).

Moreover, even if 21.031(d) could be viewed as "penalizing" the right to travel, *See Maricopa County, supra,* strict scrutiny would nevertheless be inappropriate. The only readily ascertainable basis upon which the "right to travel" cases can be squared with subsequent cases of this Court is that they involved *durational* components *and* concerned fundamental rights or necessities of life. Both this and lower courts have consistently refused to apply strict scrutiny to cases not involving durational requirements where the penalty on travel was clear. *Califano v. Aznavorian,* 439 U.S. 174, 177 (1978) (loss of benefits); *Califano v. Torres,* 435 U.S. 1 (1978) (loss of benefits); *McCarthy v. Phil. Civil Service Comm., supra* (loss of employment); *Fisher v. Reisner,* 610 F.2d 629 (9th Cir. 1979), *cert. denied* 447 U.S. 930 (1980) (reduction in workers compensation benefit); *Hawkins v. Moss,* 503 F.2d 1171 (4th Cir. 1974), *cert. denied* 420 U.S. 928 (1975); (loss of right to practice law); *Huffman v. Montana Sup. Ct.,* 372 F. Supp. 1175 (D. Mont. 1974) (3 jd.ct.) (denial of exemption from bar exam). The Court has recognized that certain "penalties" on interstate travel are a necessary product of the "independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents." *Califano v. Torres, supra* at 4-5. It may be noted that the "penalty" involved in *Califano v. Torres, supra,* was of the same character as that in *Shapiro v. Thompson, supra.* Similarly, *McCarthy* involved "the right to work for a living" which "is of the very essence of the . . . [14th] Amendment . . . ." *Truax v. Raich,* 239 U.S. 33, 41 (1915). Thus the nature of the "penalty" does not, in the absence of a durational requirement, lead to

strict scrutiny.[21] In any event, Texas' residency framework does not penalize *bona fide* interstate travel; it promotes same by preserving the quality of public education. *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 714 (1972).

1) The motivational test of 21.03l(d) is neither invalid nor does it require strict scrutiny.

The only argument pressed by Petitioner which draws even remote support from the words of this Court is that based upon the language in *Shapiro v. Thompson, supra* at 255, concerning motivational residency requirements. See *also Gaddis v. Wyman*, 304 F.Supp. 717 (S.D.N.Y. 1969), *aff'd.* 397 U.S. 49 (1970). First, it may be noted that the statements in these cases were unnecessary to the decisions and thus dicta,[22] for both cases dealt with statutes utilizing durational components. Next, both cases concerned familial migration, that is, a mother legally capable of establishing a new domicile or *bona fide* residence. As noted by Justice Frankfurter concurring in *May v. Anderson*, 345 U.S. 528, 536 (1953),

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21. While the question is not involved herein, it may be noted that a durational requirement alone is also insufficient to invoke strict scrutiny. *Sosna v. Iowa*, 419 U.S. 393 (1975) (divorce jurisdiction); *In Re U.S. Ex Rel. Missouri State High School Activities Association*, 682 F.2d 147 (8th Cir. 1982); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976); *Kulovitz v. Illinois High School Association*, 462 F.Supp. 875 (N.D. Ill. 1978); *Dallam v. Cumberland Valley School District*, 391 F.Supp. 358 (M.D. Pa. 1975) (one year athletic ineligibility for child transfering districts without parents); *Sturgis v. State of Washington*, 368 F.Supp. 38 (W.D. Wash. 1973), *aff'd.* 414 U.S. 1057 (1973); *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), *aff'd.* 401 U.S. 985 (1971)(in-state college tuition).

22. Moreover, this Court's affirmance of Gaddis may not be read as an adoption of its reasoning. *Zobel v. Williams, supra* at 2315 n. 13; *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 500 (1981) (plurality opinion).

> Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.

See also New York v. Ferber, 102 S.Ct. 3348 (1982). The children in *Shapiro* and *Gaddis* would be admitted to school under Texas' residency laws for they were residing with their families as the law presumes and their mothers had the capacity to and *did* acquire *bona fide* residences. *c.f. Plyler v. Doe, supra* at 2390, (children brought into the country by parents), 2407, n.5 (Powell, J. concurring), (a different case if child came by himself). The Court of Appeals noted that residence for school purposes is more closely related to domicile than to mere presence, that under Texas law a minor can not "select or change its domicile", *Smith v. Ansley,* 257 S.W.2d 156, 157 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.); *See also* n. 2, *supra,* and held:

> Since the child's ability in Texas to acquire his own separate residence is a matter of legislative grace, it is certainly not unreasonable to require that his presence in another school district be for some cogent reason other than attending free public school in that district before qualifying for tuition-free status.

648 F.2d at 431-32. Children are much more susceptible to district hopping than entire families and their presence in a district without their parent or guardian gives rise to good faith doubts of the *bona fides* of their residence. In this manner the instant case differs markedly from *Shapiro* and *Gaddis.*[23]

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23. Furthermore it is less than clear that children have the same constitutional right to travel as do adults. Would a statute providing for the return of runaway children be subject to strict scrutiny? In any event, throughout Petitioner's argument the scenario of parents sending their child elsewhere is presented. Thus it does not appear to be the right of children to travel of their own volition for which vindication is sought here.

The discussions of purpose for migration in *Shapiro* and *Gaddis* arose in the context of whether the families were "deserving" of the benefits in question. As demonstrated above in Part V A, many of the state's interests underlying the the Texas residency system are jeopardized only by children residing in districts apart from their parents for the primary purpose of attending schools and most of those interests have little or nothing to do with who is "deserving." Accordingly, the dicta in Shapiro is inapplicable here even if Texas tested the "purpose in entering" a school district. *Gaddis v. Wyman, supra* at 723.

But more basically, the language of *Shapiro* is inapplicable to 21.03l(d) because the Texas statute concerns the purpose of a child's presence in the district rather than his purpose for moving thereto. Any bona fide residency or domicile inquiry centers upon purpose or its first cousin, intent.[24] The legitimacy of such inquiries has never been questioned by this Court or, to our knowledge, any other. The entire question of domicile, which determines "who is a full-fledged member of the polity of a state," *Elkins v. Moreno*, 435 U.S. 647, 662 n. 16 (1977), *See May v. Anderson, supra* at 539 (Jackson, J. dissenting), turns on the purpose cr intent of one's residence. *The Venus, supra.* In *Sosna v. Iowa, supra* at 409 n. 22, the Court upheld a statute which required that "residence" be "in good faith and not for the *purpose* of obtaining a marriage dissolution only." [Emphasis added]. In *Vlandis v. Kline, supra* at 453-54, the Court contrasted *bona fide* residents with those who "have come there solely for education purposes," as did the courts in *Spriggs v. Alteimer, supra, Hooban v. Boling*, 503 F.2d 648 (6th Cir. 1974), and *Kelm v. Carlson*, 473 F.2d 1267,

24. Petitioner seems to concede the propriety of inquiries concerning intent but nowhere explains the constitutional significance of the marginal distinction between purpose and intent.

1271 (6th Cir. 1973). And in *Starns v. Malkerson, supra* at 236, a regulation was upheld which required a person to have "been here for at least a year primarily as a permanent resident and not merely as a student," the court differentiating between *bona fide* residents and those residing "primarily for the purpose of attending school." *Id.* at 240. Thus contrary to Petitioner's suggestion, Brief for Petitioners p. 25, n. 18, he would not qualify for in-state tuition under *Starns*. This Court only recently noted without question that the *Starns* requirement was "a test of *bona fide* residence." *Zobel v. Williams, supra* at 2315, n. 13; *See also Weinberger v. Salfi*, 422 U.S. 749, 772 (1975). To these cases may be added the 131 years of American law following *School Dist. No. 1 v. Bragdon, supra.*

As noted by the Court of Appeals, *Arredondo v. Brockette, supra* at 430-31, a child can enter a Texas district for the purpose of attending school but *instanter*, due to changed circumstances, remain therein for another primary purpose and be admitted to school. On the basis of the distinction between the purpose for one's presence and the purpose for in-migration, the language of Shapiro can be squared with the great weight of authority and does not subject 21.031(d) to strict scrutiny or render its motivational test illicit.

2) Petitioner's legislative motive arguments are weightless.

The central theme of the Brief for Petitioner is that 21.031(d) was enacted to "[prevent] children of Mexican parents from moving to Texas, establishing a home, and attending school." p. 14.[25] Ironically, if this was "the"

25. This argument was not dealt with by the Court of Appeals since it was not pled in the trial court and was not within Petitioner's attack on the "facial" constitutionality of 21.031(d). *Ar-*

(footnote continued on following page)

purpose of 21.031(d) the Legislature failed miserably since the statute permits any child to attend school in a district in which he is present for the purpose of "establishing a home." The most evident weakness in Petitioner's argument is that it hinges upon the erroneous assumption that the special purpose doctrine happened on the scene in 1977 with the enactment of 21.031(d).[26] Of course this just isn't so. *Supra*, Part I. It would be strange to say the least if "the" motive of a legislature in codifying a doctrine of state common law of at least 72 years' vintage thereby condemned the common law to unconstitutionality. Even if the law and facts supported an attack on 21.031(d) due to legislative motive, the most that could fall would be the statute itself; Texas law would remain unaffected. Moreover, the rather odd result would obtain that Texas' statute is unconstitutional but identical statutes of several other states would survive. *c.f. Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (Legislature could reenact the statute for a benign purpose).

(footnote continued from previous page)

rendondo v. Brockette, supra at 427-28. It does appear that attacks concerning legislative purpose are distinct from those concerning facial constitutionality. *Crawford v. Bd. of Ed.*, 102 S.Ct. 3211 (1982). Thus the issue was waived by the Petitioner below and should not be considered in this Court.

26. In Petitioner's version the statute was enacted due to the views of South Texas superintendents that it was too easy for "Mexican nationals" to obtain "guardianships" and the resulting recommendations of the Mexican Immigrant-Alien Student Study. Brief for Petitioners, p. 15-17. Def.Ex.3. The actual recommendation was to restrict guardianships. J.A. 86a. Contrary to Petitioner's suggestion, those views must have fallen on deaf ears for the statute in no way restricts the appointment of guardians.

In truth, the motive[27] for the enactment of 21.031(d) is of no import herein. The statute does not cause a disparate impact on any racial group, upon international travelers or interstate travelers. *Supra* Part V(B). Consequently, "judicial inquiry into legislative motive is unnecessary, as well as undesirable." *Brown v. Califano*, 627 F.2d 1221, 1234 (D.C. Cir. 1980) quoted in *Crawford v. Bd. of Ed., supra* at 3222 n. 31; *Palmer v. Thompson, supra; U.S. v. O'Brien*, 391 U.S. 367, 383 (1968); *See Rogers v. Herman Lodge*, 102 S.Ct. 3272, 3286 (1982) (Stevens, J. dissenting).

C. An elevated standard of review of section 21.031(d) is not supported by substantive due process authorities.

Petitioner's argument that the classification pertaining to children living apart from their parents or guardians should be scrutinized strictly because it "interfere[s] with family decisions with respect to living arrangements and education" is without merit. Brief for

27. Contrasting with the statement of Sen. Longoria concerning children from Mexico, Brief for Pet. p. 17, the actual sponsor of the statute, Rep. Torres, testified that "primarily it complies with the opinions of the Attorney General," J.A. 69a, and later responded to a question concerning the effect of the bill on the attendance of illegal aliens by referring to children who "cross over for the weekend and attend our public schools" who are not "*bona fide* residents of the school district." J.A. 74a. Representative Torres' motive is unimpeachable. *c.f. Califano v. Aznavorian, supra* at 177. Even based on this incomplete legislative history, one must ask: whose motive is relevant? *Mobile v. Bolden*, 446 U.S. 55, 74 n. 20 (1980) (plurality opinion). There is no evidence of the motives of the really pertinent legislators, the Speaker of the House and the Lieutenant Governor, or the Governor who signed the Bill. Moreover, it is not altogether clear that Sen. Longoria's motive, which when viewed in light of the statutory language was at most to prevent children from coming into a district to attend school, was illegitimate. Petitioner's attack fails on the facts as well as the law.

Petitioner, p. 28. While *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), established that a state could not monopolize education, this holding can not be transposed into a requirement that a state provide an education whenever, wherever and however a parent desires. *See Harris v. McRae*, 448 U.S. 297, 318 (1980). To the extent that Pierce rested on principles arising from the First Amendment, it has absolutely no application in the context of *bona fide* residency requirements.

Neither can this Court's decision in *Moore v. City of East Cleveland, supra*, be read as subjecting all statutory classifications which pertain to living arrangements to strict scrutiny. In fact, Texas' residency system incorporates the Court's reasoning in *Moore* that children must reside apart from their parents at times. Prohibition of necessary extended familial relationships is vastly different from a classification limiting the availability of governmental services to children living in unnecessary arrangements made desirable only in the event such services are available. Since Texas permits admission of children who reside in extended familial relationships for reasons other than to capitalize on the governmental service of education, 21.031(d) impacts personal liberty in a more minimal manner than did the Hyde Amendment upheld under the rational basis test in *Harris v. McRae, supra.* It seems plain that a classification concerning the availability of governmental benefits as benign as that of 21.031(d), in contrast to those pertaining to governmental prohibitions, should be reviewed under the rational basis test. Indeed, even the dissents in *Harris* would not reach 21.031(d) for they hinged upon the fundamental nature of the child-bearing choice; there is no fundamental right to governmental inducements for conduct which otherwise would not be desirable or necessary. *See also Planned Parenthood of Minnesota v. State of Minnesota*, 612 F.2d 359 (8th Cir. 1980), *aff'd.* 448 U.S. 901 (1980). Petitioner's argument proves too

much; it would subject all governmental classifications relating to living arrangements to heightened review. *See Delgado v. Immigration and Naturalization Service*, 637 F.2d 762 (10th Cir. 1980) (deportation of father); *Ensminger v. C.I.R.*, 610 F.2d 189 (4th Cir. 1979), *cert. denied*, 446 U.S. 941 (1979) (income tax treatment of married couples).

The very case relied upon, *Moore v. City of East Cleveland, supra*, refutes Petitioner's contention.

> Appropriate limits on substantive due process come . . . from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society.'

431 U.S. at 503. Certainly the history of our school district system and *bona fide* residency requirements demonstrate that 21.031(d) is of the " 'traditions from which [this country] developed.' " *Id.* at 501.

D. Intermediate scrutiny is not implicated here by *Plyler v. Doe.*

While 21.031(d) would satisfy intermediate scrutiny, that is the incorrect standard to apply in this context. In *Plyler v. Doe*, the Court expressly distinguished the issue herein, *supra* at 2400 n. 22, and the reasoning of the case is based upon the lack of control the children therein could exercise over their own status, for they were brought into the country by their parents and with their parents. Under 21.031(d) it is the purpose of the *child's* presence in the district which is evaluated and Petitioner can hardly claim that he is a victim of his parent's illegal residence. Moreover, as a result of the Court's ruling in *Plyler* a reversal of the Court of Appeals herein would mean that the states would be forced constitutionally to educate illegal alien children who live in this country without their parents for the purpose of attending school.

Nor is the Court faced with the spectre of an underclass of uneducated children growing up in this country. Presumably, a child who resides in a district for the primary purpose of attending school will not remain there if he or she can not attend school, just as apparently Petitioner's co-plaintiffs returned to their parents in other areas of Texas, the United States and Mexico.[28] Petitioner's claim that 21.031(d) absolutely deprives children of an education must be ignored for it assumes that an education is unavailable where a child's parents reside which certainly is not true as a general matter.[29] The finding of the District Court concerning deprivation, J.A. 25a, no. 25, must be qualified with the observation that it would be the case only in the unlikely event that a child remained in a district notwithstanding the frustration of his primary purpose for being there. Thus neither of the confluent elements in *Plyler* are present herein and the more exacting standard utilized to strike down Section 21.031(c) is inapplicable to 21.031(d).

E. 21.031(d) easily satisfies the appropriate standard of review.

Since 21.031(d) does not invoke the analysis of the "right to travel" cases and neither affects the exercise of a fundamental right guaranteed by the Constitution nor

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28. In this regard the District Court found that Petitioner "only intends to reside in the McAllen Independent School District until he completes his education." J.A. 23a.

29. Had this case challenged the statute as applied to Petitioner, Respondents would have placed into evidence the transcript of the hearing before the McAllen School Board where Petitioner testified that he was attending school in Mexico before he moved to McAllen.

draws a suspect classification,[30] it must be evaluated under the familiar rational basis test. *San Antonio I.S.D. v. Rodriguez, supra; Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). It is clearly rational to distinguish between children who reside with their parents or guardians and children who do not; the interests discussed above relate almost exclusively to the problems associated with students living apart from their families and the relative ease with which children can move or be sent around without their families. This classification has uniformly been upheld. *In Re U.S. Ex. Rel. Missouri State High School Activities Association, supra; Albach v. Odle, supra; Kulovitz v. Ill. High School Association, supra; Dallam v. Cumberland Valley School Dist., supra.*

The second classification drawn by Section 21.031(d) is also constitutional. The distinction between children who reside in a district primarily for educational purposes and those who do so for other purposes is necessary in order to create an exception to the general state policy for children who must live apart from their parents without unnecessarily jeopardizing the State's school system.

In fact, Texas' residency system as a whole is necessary to promote a compelling state interest, the preservation of a quality school system. Petitioner claims that less restrictive means are available, citing

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30. While Petitioner argues that the classification is based on race, the premise rests entirely upon the proferred analysis of legislative motive which, interestingly, rests exclusively upon the statement of a Mexican-American legislator. Certainly the statute on its face does not relate to race, and the application in practice is not before the Court. In any event, as demonstrated above, the statute does not disparately impact any group, much less those of one race.

statutes which require permanence of residence or support by the custodian.[31] Brief for Petitioner, pp. 37-38. However, Petitioner has advanced no principled constitutional basis upon which to differentiate these restrictions, one of which relates to intent, from the requirements of 21.031(d). Further, the alternatives are not less restrictive; it seems that they merely exclude a different group of children. In addition, the statutes approved by Petitioner do not serve the same interests as does 21.031(d).[32] Accordingly, it is not unreasonable to conclude that 21.031(d) is precisely tailored to further a compelling state interest.

VI. DUE PROCESS OF LAW

The Court of Appeals correctly rejected Petitioner's Due Process challenge essentially because, to the extent that 21.031(d) creates a presumption, it is universally true. *Arredondo v. Brockette, supra* at 429-31; *Elkins v. Moreno, supra* at 661. *See* Part II, *supra.* As this Court has noted, all statutes in a sense draw irrebuttable presumptions [33] and the doctrine would be an

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31. Petitioner also claims that problems involving district hopping may be solved without affecting interstate travel. This contention is essentially a claim that the state must discriminate in favor of children coming across state lines. Since no authority supports a view whereby a child from Shreveport, La., must be given a preference over a child who lives in Shreveport, Texas, the contention must be rejected. By the same token, the fact that Petitioner is a United States citizen does not entitle him to preference in school admission matters. *Plyler v. Doe, supra.*

32. This is not to say that the statutes are not constitutional; they clearly are. Each state is free to adopt reasonable definitions of *bona fide* residency which meet its particular needs; Colorado, Pennsylvania and New Jersey are not restricted to adoption of the common law in this area.

33. For example, a person whose conduct includes all of the elements of murder is irrebuttably presumed to have committed murder.

"engine of destruction" if applied to legislative classifications. *Weinberger v. Salfi, supra* at 722. As in *Salfi*, 21.031(d) does not speak of *bona fides* and then exclude evidence thereof. It merely codifies the common law definition of residence for school purposes. Consequently, it does not violate the Due Process Clause of the 14th Amendment; the reasonableness of its classifications are to be assessed under the Equal Protection Clause.

CONCLUSION

Section 21.031(d) is constitutional on its face.[34] The nature of education in the United States has derived largely from the school district system and the *bona fide* residency requirements underlying that system. As noted 30 years ago by the Vermont Supreme Court in *Lewis v. Holden, supra* at 762, in reference to the more restrictive rule followed there,

> Otherwise, any parent or guardian could turn over control of a child, for whatever reason, to whomsoever he saw fit, and pupils could attend any public school in the state that their parent or guardian desired or preferred. Such a situation could disrupt our entire school system. The consequence would be absurd.

The decision of the Court of Appeals should be affirmed.

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34. While Petitioner agrees that the case involves the constitutionality of 21.031(d) on its face, Brief for Petitioner, p.5, he persists in addressing the manner in which it is applied by McAllen. While the application of the statute in McAllen is not before the Court, the State Respondents would note that no child has challenged the decision of the McAllen School Board through an appeal to the Commissioner of Education. Texas Education Code § 11.13.

Respectfully submitted,

TRAVIS HIESTER
ATLAS & HALL
P.O. Drawer
McAllen, Texas 78501

(512) 682-5501
Attorneys for
Respondents
Rodney Cathey and
McAllen Independent
School District

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

C. ED DAVIS
Chief, State and County Affairs

RICHARD L. ARNETT
Special Assistant
Attorney General
Deputy Commissioner
for Legal Services
Texas Education Agency
201 East 11th Street
Austin, Texas 78701
(512) 475-3272

Attorneys for Respondents
Raymon L. Bynum and Texas
Education Agency

TEXT OF TEXAS EDUC.CODE §21.031(d)

In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools.

STATEMENT OF AMICI CURIAE

The following states support Respondents' position that the adoption of a mere presence or "*de facto*" residence test for tuition-free school admission would be highly disruptive of public education and that the various states' school residency requirements should, as a general matter, be upheld if they are rationally related to legitimate state interests.

Robert L. Brunelle
Commissioner
Department of Education
State of New Hampshire

Robert D. Stone
Deputy Commissioner for
Legal Services
State Department of Education
State of New York

Linley E. Pearson
Attorney General
State of Indiana

Stephen S. Kaagan
Commissioner
Department of Education
State of Vermont

Steven L. Beshear
Attorney General
State of Kentucky

Robert O. Wefald
Attorney General
State of North Dakota

Petitioner's Reply Brief

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No. 81-857

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ORALIA MARTINEZ, as next friend of ROBERTO MORALES,
Petitioners,

v.

RAYMON L. BYNUM, as Texas Commissioner of Education; The TEXAS EDUCATION AGENCY, McALLEN INDEPENDENT SCHOOL DISTRICT; and RODNEY CATHEY, as Superintendent of McAllen Independent School District,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

JAMES A. HERRMANN
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
305 E. Jackson, Suite 206
Harlingen, Texas 78550
(512) 423-3111
Counsel Of Record For Petitioner

EDWARD J. TUDDENHAM
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
P.O. Box 2223
Hereford, Texas 79045
(806) 364-3691

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INDEX

	Page
I. FINDING SECTION 21.031(d) UNCONSTITUTIONAL WILL NOT FEDERALIZE THE LAW OF RESIDENCE	1
II. SECTION 21.031(d) DOES NOT CODIFY THE COMMON LAW OF SCHOOL RESIDENCE	2
A. Respondents' Special Purpose Doctrine Is Not Part Of The Common Law Of Residence	2
B. *School Dist. No. 1 v. Bragdon*, 23 N.H. 507 (1851), And Similar Cases Are Contrary To The Current Law Of School Residence In The United States	4
C. Section 21.031(d) Substantially Changes Prior Texas Law	8
III. RESPONDENTS HAVE FAILED TO DISTINGUISH THE RIGHT TO TRAVEL CASES	10
A. Petitioner's Right To Travel Is Not Diminished By His Youth	10
B. Respondents Concede Section 21.031(d) Burdens The Right To Travel	11
IV. RESPONDENTS HAVE FAILED TO DISTINGUISH *PLYLER* v. *DOE*, 457 U.S. ___ (1982)	12
V. SECTION 21.031(d) IS NOT RATIONALLY, LET ALONE SUBSTANTIALLY OR NECESSARILY, RELATED TO THE STATE'S INTERESTS	14
A. Respondents' Claim As To The Numbers Of Children Who Will Establish Homes Apart From Their Parents Are Exaggerated	14
B. Section 21.031(d) Does Not Promote Desegregation Efforts	15
C. The Distinctions Drawn By Section 21.031(d) On The Basis Of Motive Are Not Rationally Related To Any Of The Purposes Offered By Respondents.	15
VI. CONCLUSION	18

TABLE OF CASES AND AUTHORITIES

CASES: Page

Anderson v. *Breithbarth*, 245 N.W. 483 (N.D. 1932) .. 9

Ashley v. *Bd. of Ed.*, 114 N.E. 20 (Ill. 1916) 17

Bd. of Ed. v. *Barnette*, 319 U.S. 624 (1943) 10

Bd. of Ed. v. *Crill*, 134 N.Y.S. 311 (Sup. Ct. 1912) ... 5

Bd. of Ed. v. *Foster*, 76 S.W. 354 (Ky. 1903) 4, 5

Bd. of Trustees v. *Powell*, 140 S.W. 67 (Ky. 1911) 13

Brownsville Ind. Sch. Dist. v. *Gamboa*, 498 S.W. 2d 448 (Tex.Civ.App. 1973 Writ ref'd n.r.e.) 8, 9

Cline v. *Knight*, 137 P.2d 680 (Colo. 1943) 5

Commonwealth v. *Balmer*, 164 Pa. 607 (1894) 5

DeLeon v. *Harlingen Ind. School Dist.*, 552 S.W. 2d 922 (Tex.Civ.App. 1977) 9

Dickerman v. *Northern Trust Co.*, 176 U.S. 181 (1900) 3

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 1, 11, 12

Edwards v. *California*, 314 U.S. 160 (1941) 5, 6

Elkins v. *Moreno*, 435 U.S. 647 (1978) 2

Fry v. *Upper Swatara Twp.*, 164 Pa. 603 (1894) 5

Gaddis v. *Wyman*, 304 F.Supp. 717 (S.D.N.Y. 1969) Affd. per cur. sub nom. *Wyman* v. *Bowens*, 397 U.S. 49 (1970) 11

Gardner v. *Bd. of Ed.*, 38 N.W. 433 (Dak. 1888) 4, 13

Gentile v. *Bd. of Ed.*, 288 N.Y.S. 2d 269 (Sup. Ct. 1968) 8

Grand Lodge I.O.O.F. v. *Bd. of Ed.*, 110 S.W. 440 (W.Va. 1922) 17

H.L. v. *Matheson*, 450 U.S. 398 (1981) 10

Haverhill v. *Gale*, 103 Mass. 104 (1869) 4

In re Gault, 387 U.S. 1 (1967) 10

Jackson v. *Waco I.S.D.*, 629 S.W. 2d 201 (Tex.Civ.App. - Waco 1982, writ ref'd n.r.e.) 15

Jones v. *Helms*, 452 U.S. 412, (1981) 11

Mariadahl Children's Homes v. *Bellegarde*, 180 P2d 612 (Kan. 1947) 17

M'Donald v. *Smalley*, 1 Pet. (7 U.S.) 620 (1828) 3

Table of Authorities Continued

Page

Memorial Hosp. v. *Maricopa Co.*, 415 U.S. 250 (1974) 1-2, 12
Mills v. *Bartlett*, 377 S.W. 2d 696, 637 (Tex. 1964) ... 2
Morris v. *Gilmer*, 129 U.S. 315 (1889) 3
Plyler v. *Doe*, 457 U.S. ____, 50 U.S.L.W. 4650 (1982) ..... *passim*
Public School v. *Wright*, 141 N.W. 866 (Mich. 1913) .. 7, 8
School Dist. v. *Pollard*, 55 N.H. 503 (1875) 4
School District v. *School District Custer Tp.*, 211 N.W. 60 (Mich. 1926) 5
School Dist. No. 1 v. *Bragdon*, 23 N.H. 507 (1851) . 4, 5, 6
Shapiro v. *Thompson*, 394 U.S. 618 (1969) ..... *passim*
Shaw v. *Small*, 125 A. 496 (Me. 1924) 7
State v. *DeCasinova*, 1 Tex. 401 (1846) 2, 3
State v. *School Dist. No. 12*, 18 P.2d 1010 (Wyo. 1933) 4
State v. *Selleck*, 107 N.W. 1022 (Neb. 1906) 3, 5
Snyder v. *Pitts*, 150 Tex. 407 (1951) 2
The Venus, 8 Cranch 253 (1814) 2, 3
Tinker v. *Des Moines School Dist.*, 393 U.S. 503 (1969) 10
Valley v. *Rapides Parish School Dist.*, 646 F.2d 925 (5th Cir. 1981) cert. den. 102 Sup. Ct. 1430 (1982) 15
Vlandis v. *Kline*, 412 U.S. 441 (1973) 1
Whatley v. *Clark*, 482 F.2d 1230 (5th Cir. 1973) 2
Wheeler v. *Burrow*, 18 Ind. 14 (1862) 4
Williamson v. *Osenton*, 232 U.S. 619 (1914) 3
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 11
Yale v. *West Middle School Dist.*, 59 Conn. 489 (1890) 5, 9
Zobel v. *Williams*, 457 U.S. ____, 50 U.S.L.W. 4613 (1982) 2, 5, 11

Table of Authorities Continued

Page

STATUTES:

Alaska Stat § 14.03.080(a)(1981) 7
Ariz. Rev. Stat. § 15-823 E. 8
Colo. Rev. Stat. § 22-1-102(2)(g) (1973) 6
Conn. Gen. Stat. § 10-253(d) (1981 Supp.) 6
D.C. Code Ann. § 31-602(d) 6
Fla. Stat. Ann. §§ 230.232 and 228.121 (West 1981 Supp.) 7
Hawaii Rev. Stat. § 298-18 (1976) 7
Idaho Code §§ 33-201 and 33-1401(10) 6
Ind. Stat. Anno. § 20-8.1-6.1-1(e) 8
Iowa Code Ann. § 282.1 (West 1981 Supp.) 7
Kan. Stat. Ann. § 72-1046 6
La. Rev. Stat. Ann. § 17.151 (West 1982) 7
Minn. Stat. Ann. § 120.06 (West 1981 Supp.) 7
Miss. Code Ann. § 37-15-29 (1972) 7
Mo. Ann. Stat. § 167.151 (1965) 6
Okla. Stat. Ann. Tit. 70 § 1-113 (West 1972) 6
24 Pa. Cons. Stat. Ann. § 13-1302 (Purdon 1981 Supp.) 6
Nev. Rev. Stat. § 392.040 (1979) 7
N.J. Stat. Ann. § 18A: 38-1 (West 1981 Supp.) 6
N.M. Stat. Ann. § 22-12-4 (1978) 7
N.Y. Educ. Law § 3202 4(b) (McKinney 1981) 6
Tenn. Code Ann. § 49-1701 (1977) 7
Tex. Educ. Code § 21.031(d) (Vernons 1981 Supp.) ..... *passim*
Tex. Family Code § 11.04 and Chs. 35, 51-54 (Vernons 1981 Supp.) 7
Utah Code Ann. § 53-4-7 (1981) 7
Wash. Rev. Code Ann. § 28A.58.190 (West 1981 Supp.) 7
West Va. Code § 18-5-15 (1982 Supp.) 7

OTHER SOURCES:

N.Y. Times, Sept. 1, 1982, at 8, col. 1 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-857

ORALIA MARTINEZ, as next friend of ROBERTO MORALES,
Petitioners,

v.

RAYMON L. BYNUM, as Texas Commissioner of Education; The TEXAS EDUCATION AGENCY, McALLEN INDEPENDENT SCHOOL DISTRICT; and RODNEY CATHEY, as Superintendent of McAllen Independent School District,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

I. FINDING SECTION 21.031(d) UNCONSTITUTIONAL WILL NOT FEDERALIZE THE LAW OF RESIDENCE

Respondents argue that holding § 21.031(d) unconstitutional will have the effect of federalizing the law of residence and will usurp from the states the right to define residence. This assertion misconceives the issues at stake in this case.

While this Court has recognized the states' interest in residence requirements, it has not hesitated to strike down methods of defining residence which are neither "appropriately defined" nor "uniformally applied." *Dunn* v. *Blumstein*, 405 U.S. 330, 342 n.10 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Memorial Hospi-*

tal v. *Maricopa County*, 415 U.S. 250, 255 (1974); see *Elkins* v. *Moreno*, 435 U.S. 647 (1978); *Zobel* v. *Williams*, 457 U.S. ——, 50 U.S.L.W. 4613 (1982). The question presented by this case is not how states should define residence or what criteria they may consider, but whether Texas' statutory scheme for determining school eligibility is appropriately defined and uniformally applied. Section 21.031(d) selects one class of children, those who live with custodians primarily for educational purposes, and prohibits them from establishing residence solely because of their motive for establishing residence. This motive criteria is not an appropriate definition of residence nor is it uniformally applied. It is a distinct eligibility requirement imposed on certain children to prevent them from attending school. Because this statute has as its purpose the elimination of children from public school based solely on purpose and without regard to rational factual indices of residence, the statute is inconsistent with the developed common law and the traditional national interest in universal school attendance.

II. SECTION 21.031(d) DOES NOT CODIFY THE COMMON LAW OF SCHOOL RESIDENCE

A. Respondents' "Special Purpose Doctrine" Is Contrary To The Common Law Of Residence

Respondents cite *The Venus*, 8 Cranch 253 (1814) for the proposition that the common law of residence includes something called the "special purpose doctrine"—a doctrine which precludes a person who moves for a special purpose from establishing residence. In fact no such common law doctrine exists.

Residence, in the sense of domicile, has been defined in Texas as the place where one actually lives coupled with an intent to remain in that place and make it one's home. *State* v. *DeCasinova*, 1 Tex. 401 (1846); *Snyder* v. *Pitts*, 150 Tex. 407 (1951); *Mills* v. *Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964); *Whatley* v. *Clark*, 482 F.2d 1230, 1232 (5th Cir. 1973) ("one's home and fixed place of habitation to which he intends to return after any temporary absence"). The special purpose doctrine

referred to in *The Venus*, 8 Cranch 253, 278 (1814), is nothing more than a restatement of the general definition of residence that a *temporary* absence, for whatever reason, will not change residence as long as there is a *fixed intent to return* to one's prior place of residence. *State* v. *DeCasinova*, 1 Tex. at 407-408. Motive may be evidence of lack of permanence, but in the end it is the traditional test of residence, the intent to remain or to return, which controls.[1] *Morris* v. *Gilmer*, 129 U.S. 315, 328 (1889); *Williamson* v. *Osenton*, 232 U.S. 619 (1914). The fact that a person may have as his primary motivation the desire to obtain an education, without more, does not *necessarily* mean he has not settled in a home with sufficient permanence to establish residence.[2] This is especially true with respect to school residence which requires little or no permanence. *See Plyler* v. *Doe*, 457 U.S. at ____ n.22, 50 U.S.L.W.

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[1] Respondents attempt to bring Section 21.031(d) within the traditional definition of residence by claiming that motive is the "first cousin" of "intent to remain." This is specious. R. Brief at 23. Intent to remain in a place is entirely different from the motivations which lead one to decide to remain in a place. The distinction is the same as that between the intent to form a contract and the motive which leads one to decide to enter into that contract. *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 190 (1900); *M'Donald* v. *Smalley*, 1 Pet. (7 U.S.) 620, 623 (1828).

[2] This was recognized explicitly in *State* v. *Selleck*, 107 N.W. 1022 (Neb. 1906), one of the cases which Respondents cite as support for the "special purpose doctrine":

> If the family is removed temporarily to the school district for the principal purpose of obtaining the advantages of the school without expense to the family, the school authorities may protect the district from such imposition. If the removal to the district is solely for school purposes, still, if the legal residence of the family is actually changed to the school district, whatever the motive may be for so doing, there can be no doubt of the right of the children to school privileges.

Id. at 1024.

4656 (1982); *School Dist.* v. *Pollard*, 55 N.H. 503, 505 (1875). Petitioner has established such a home. [FF.7; A.22a]

Respondents' so called "special purpose" doctrine turns the common law definition of residence on its head. It focuses entirely on motive and completely eliminates any reference to the controlling factual question: whether a person has settled and established a home.

B. *School District No. 1* v. *Bragdon*, 23 N.H. 507 (1851) And Similar Cases Are Not Valid Precedent And Are Contrary To The Current Law Of School Residence In The United States

School Dist. No. 1 v. *Bragdon*, 23 N.H. 507 (1851), and the other school cases relied on by Respondents[3] do not establish motive as a dispositive criterion for school residence. Although reciting in dicta that moving for school purposes precludes residence, few of these cases actually denied children free admission to school. Those that did deny admission frequently eschewed inquiry into motive and instead based their decision on "objective facts—those matters not depending upon ingenious conjecture as to what may be graven on the hidden tablets of the mind." *Gardner* v. *Bd. of Ed.*, 38 N.W. 433, 434 (Mich. 1888) (family lived in district only temporarily during school term); *State* v. *School Dist. 12*, 18 P.2d 1010 (Wyo. 1933) (family commuted weekends to permanent home outside district). See *Haverhill* v. *Gale*, 103 Mass. 104 (1869) (children commuted weekends to parents' home outside district). Cases which actually used motive as a basis for denying school admission applied motive as a distinct eligibility requirement in addition to actual residence in the district. See e.g. *Bragdon, supra; Wheeler* v. *Burrow*, 18 Ind. 14 (1862); *Bd. of Ed.* v. *Foster*, 76 S.W. 354 (Ky 1903). This special requirement was not established because of difficulty in determining the residence of children living apart from their parents. The motive

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[3] Respondent's Brief at 8-9, n.6, n.8. [Hereafter R.Brief].

exclusion applied to families that moved for school purposes as well as to children. *State* v. *Selleck*, 107 N.W. 1022 (Neb. 1906); *Bd. of Ed.* v. *Crill*, 134 N.Y.S. 311 (Sup. Ct. 1912); *School Dist.* v. *School Dist. No. 1 Custer Tp.*, 211 N.W. 60 (Mich. 1926). The application of the motive exclusion to families as well as to children suggests that the requirement arose out of the same insular community attitudes which supported poor laws and removal statutes during the 19th and early 20th centuries. See *Shapiro* v. *Thompson*, 394 U.S. at 628, n.7. Like durational residence requirements, its purpose was exclusionary. The motive requirement reflected a perception that community benefits were earned, and that those who had not in the past contributed to the community's taxes, or who had moved in order to take advantage of a particulr community benefit were undeserving of those benefits regardless of their actual residence.[4] See e.g. *Fry* v. *Upper Swatara Twp.*, 164 Pa. 603 (1894); *Board of Ed.* v. *Foster*, 76 S.W. 354 (Ky, 1903). Such attitudes have been rejected by this Court. *Edwards* v. *California*, 314 U.S. 160 (1941); *Shapiro, supra; Gaddis* v. *Wyman*, 304 F.Supp. 717 (S.D.N.Y. 1969) aff'd. sub nom. *Wyman* v. *Bowens*, 398 U.S. 49 (1970); *Zobel* v. *Williams*, 457 U.S. ___ (1982), 50 L.W. 4616, n.10. *Bragdon* and the other school cases cited by Respondents are not valid precedent.[5]

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[4] That these cases were deciding who was deserving rather than ascertaining residence (or, for that matter, motive) can be seen in several examples: Pennsylvania generally excluded children who moved for school purposes, but allowed the children of Union soldiers to attend in any district even if they moved there for the purpose of attending school. *Commonwealth* v. *Balmer*, 164 Pa. 607 (1894). (Query whether Confederate veterans would have received the same treatment?). In *Yale* v. *West Middle School Dist.*, 59 Conn.489 (1890), the court recites the special purpose doctrine, but because the child's circumstances were needy the court found him to be a resident and did not inquire into the motives that brought him to Connecticut. See *Cline* v. *Knight*, 137 P.2d 680, 686 (Colo. 1943) (Jackson, J. dissenting).

[5] Limiting the application of this motive requirement to children living with custodians, as Texas has done, exacerbates the impermissible exclusionary purpose of the requirement by applying it in a discriminatory manner to only one class of children.

Even before the constitutional developments in *Edwards* v. *California*, 314 U.S. 160 (1941) and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), the increasing national importance of assuring an education for all citizens, and the increasing mobility of the population led states to reject motivational requirements such as those used in *School Dist. No. 1* v. *Bragdon*.

Although Respondents list in their Brief at p. 8, n.4, cases from Colorado, Connecticut, Missouri, New Jersey, and New York which deny admission to children who move for the primary purpose of attending school, all of those states have since adopted statutes which define a child's residence in terms of objective factors without regard to motive.[6] In addition Kansas, Idaho, Pennsylvania, Oklahoma, and the District of Columbia also allow children to establish a school residence apart from their parents, regardless of the purpose for doing so, as long as their residence meets certain objective criteria.[7] Other states allow for the admission of children in the district

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[6] Colo. Rev. Stat. § 22-1-102(2)(g) (1973) (intent to remain indefinitely); Conn.Gen.Stat. § 10-253(d) (1981 Supp.) (home permanent and provided without pay); Mo.Ann.Stat. § 167.151 (1965) (parents don't contribute to support); N.J.Stat.Ann § 18A:38-1 (West 1981 Supp.) (custodian must file affidavit child is domiciled in district and supported gratis); N.Y.Educ.Law § 3202 4(b) (McKinney 1981) (custodian provides actual and only home).

[7] Kan.Stat.Ann. § 72-1046 (1982 Supp.) (custodian contributes major portion of the cost of support of child); Idaho Code §§ 33-201 and 33-1401(10) (custodian must have power of attorney for not less than school term); 24 Pa.Cons.Stat.Ann. § 13-1302 (Purdon 1981 Supp.) (custodian supporting child gratis); Okla.Stat.Ann. Tit. 70, § 1-113 (West 1972) (custodian contributes in major degree to support of child); D.C.Code Ann. § 31-602(d) (parent unable to supply care, custody, and support).

where they reside without reference to their motive for living there.[8]

States which require a child to live with a parent or legal guardian in all circumstances are not contrary to this trend toward assuring maximum school attendance. At least some states interpret "legal guardian" to include custodians such as Petitioner's sister.[9]

Even those states which still refer to motive as a basis for determining residence do not exclude children in all circumstances where they have moved primarily for school purposes. Children are allowed to show that even though they live apart from their parents for educational purposes, it is in their best interests to do so. For example, Indiana, whose statute Respondents claim is similar to Texas', R.Brief at 11, n.11, specifically provides that children in Indiana whose parents

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[8] Alaska Stat. § 14.03.080(a) (1981); Fla.Stat.Ann. §§ 230.232 and 228.121 (West 1981 Supp.); Hawaii Rev. Stat. § 298-18 (1976); Iowa Code Ann. § 282.1 (West 1981 Supp.); La.Rev.Stat. Ann. § 17.151 (West 1982); Minn.Stat.Ann. § 120.06 (West 1981 Supp.); Miss.Code Ann. § 37-15-29 (1972); Nev.Rev.Stat. § 392.040 (1979); N.M.Stat.-Ann. § 22-12-4 (1978); Tenn.Code Ann. § 49-1701 (1977); Utah Code Ann. § 53-4-7 (1981); Wash. Rev. Code Ann. § 28A.58.190 (West 1981 Supp.); W.Va. Code § 18-5-15 (1982 Supp.)

[9] *Public Schools* v. *Wright*, 141 N.W. 866 (Mich. 1913); *Shaw* v. *Small*, 125 A. 496 (Me. 1924). The constitutionality of a requirement that in all circumstances a child live with a legal guardian is not raised in this case as alleged by Respondents. R.Brief at 13. States which require children to live with legal guardians might do so because state law does not grant custodians sufficient authority to protect the health and safety of the child. *Texas law does*. Tex.Fam.Code § 11.04 and Chs. 35, 51-54. Moreover, these states at least impose a uniform guardianship requirement on all children. Texas, by contrast, allows children generally to live with custodians and attend school, but denies that right to a select group of children solely because of their motives. It is that unequal treatment based on motive which is at issue in this case.

reside outside the U.S. may attend school in the district where they live. Ind. Stat. Anno. § 20-8.1-6.1-1(e). Similarly Arizona amended its statute in 1981 to recognize the special needs of citizen children whose parents reside outside the state and to ma e allowance for them to be admitted to school tuition free in their custodian's district. Arizona Rev. Stat. § 15-823 E. See also *Public School* v. *Wright*, 141 N.W. 866 (Mich. 1913) (child living with custodian whose father lives in Norway admitted as a resident); and *Gentile* v. *Bd. of Ed.*, 288 N.Y.S.2d 269 (Sup. Ct. 1968) (child brought from South for purpose of going to a quality high school which his parents could not provide in their home may be admitted to school). Indeed, a review of the statutes and cases cited by Respondents in support of their so called "special purpose doctrine" suggests that Petitioner's desire for an education in the United States would not bar him from attending school in any state other than Texas.

Texas' use of motive as a dispositive bar to establishing residence stands in stark contrast to these other states. Rather than defining school residece to assure that all of its citizens have an opportunity to attend school, Texas has chosen to conserve its school resources by defining select groups of children to be ineligible for school. First it excluded undocumented alien children and then, with § 21.031(d), it prevented the citizen children of aliens from attending school.

C. Section 21.031(d) Substantially Changed Prior Texas Law

Contrary to Respondents' claim that Section 21.031(d) merely codified Texas common law, the enactment of that statute substantially restricted prior Texas law by raising motive to the level of the dispositive criteria of residence for one class of school applicants. Prior to the 1977 enactment of Section 21.031(d), Texas courts had interpreted school residence much less rigidly. In *Brownsville Independent School Dist.* v. *Gamboa*, 498 S.W.2d 448 (Tex.Civ.App. 1973), the court held that the fact that a child moved to a district for the purpose of attending school did not, by itself, preclude the child from

establishing residence in that district. Instead, the court determined the child's residence by considering all of the objective factors evidencing his residence, such as how long he had lived in the district, how frequently he returned to visit his parents in Mexico, and who provided his food and clothing.[10]

Even the Attorney Generals' Opinions, on which Respondents rely, do not go so far as to support the restrictive standard of residence embodied in Section 21.031(d). Although the opinions state that a child is not a resident if his home in a district is merely "ostensible" for the purpose of attending school, they nowhere suggest that motive alone proves that a residence is merely "ostensible." R.Reply To Cert Pet. at A5. Quite the contrary, the Attorney General concluded in 1973 that, "[i]n each instance the school official . . . will have to weigh *all of the facts* and conclude that the residence is either bona fide or ostensible." *Id.* at A5 (emph. added).

Thus, contrary to Respondents' claim, Texas law prior to the passage of § 21.031(d) required consideration of all of the facts bearing on residence. Motive was only one factor to be taken into consideration. As discussed in Petitioner's Brief at pp. 14-17, Texas school administrators, particularly those along the border with Mexico, feared that the residence standard applied by the *Gamboa* court was too easy to satisfy and risked an influx of children moving from Mexico to Texas. See Def.-

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[10] In considering these factors the court applied a standard very similar to that utilized by those states cited in footnotes 6 and 7 above. One other factor considered by the court in *Gamboa* was the fact that the child's aunt had become his legal guardian. The court did not, however, hold that this factor was a necessary factor. Texas' family code gives a custodian sufficient legal control over a child that a legal guardian is not necessary in order to assure that the child lives with a responsible adult. See *DeLeon* v. *Harlingen I.S.D.*, 552 S.W.2d 922, 926-927 (Tex. Civ. App. 1977) (with respect to Olga Garza); *Anderson* v. *Breithbarth*, 245 N.W. 483 (N.D. 1932); *Yale*, *supra*, 22 A. 295.

Exh. 3 at 20. In order to avoid the expenses of such migration, they successfully lobbied the legislature to "make it more difficult for kids to be brought in from Mexico to attend school in the United States." [A. 59a]. This was done by making a child's motive for establishing a home in a school district a dispositive bar to resident status. This change in the law is unconstitutional.

> [A] State may 'not . . . reduce expenditures for education by barring [some arbitrarily chosen class] of children from its schools.' *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969).

Plyler v. *Doe*, 457 U.S. ____, 102 S.Ct. at 2401.

III. RESPONDENTS HAVE FAILED TO DISTINGUISH THE RIGHT TO TRAVEL CASES

A. Petitioner's Right To Travel Is Not Diminished By His Youth

Respondents argue that Roberto has no right to travel because he is a minor, and because his parents are the one's making the decision that Roberto should settle in the United States. However, the fact that Roberto is a minor does not mean that he does not have a right to live in the United States. The Constitution protects children as well as adults. *In Re Gault*, 387 U.S. 1 (1967); *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969). Moreover, a child's rights are not diminished simply because the child's parents are the ones directing the child in the exercise of his rights. *Board of Ed.* v. *Barnette*, 319 U.S. 624 (1943).[11]

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[11] Where a conflict arises between a parents's right to control his child and the child's exercise of his rights, such as with runaway children or custody fights, the State may be able to legitimately limit the child's rights because of the parents' paramount interest in controlling his child. *H.L.* v. *Matheson*, 450 U.S. 398 (1981). However, that issue is not presented by this case, for, as Respondents recognize, Petitioner's move to McAllen was a family decision; no conflict

B. Respondents Concede That Section 21.031(d) Burdens The Right To Travel

Respondents fail to distinguish *Shapiro*, and *Gaddis* v. *Wyman*, 304 F.Supp. 717 (S.D.N.Y. 1969) aff'd. per cur. sub nom. *Wyman* v. *Bowens*, 397 U.S. 49 (1970), with the argument that Section 21.031(d) examines "the purpose of a child's presence in the district rather than his purpose for moving thereto." R.Brief at 23. Whichever purpose is examined, its use as a basis for denying resident status has the effect of depriving children of a public education in the place where they live. This penalty severely burdens a child's constitutional right to establish a home in a district by forcing him to move elsewhere or to suffer the consequences of growing up without an education if he stays. Respondents concede that Section 21.031(d) has this effect, R.Brief at 29, and thereby concede that the statute operates to burden travel.

Respondents' assertion that Petitioner needs to show a disparate impact on new migrants to establish a right to travel violation is incorrect. R.Brief at 18-19. The right to travel is "an unconditional personal right," *Dunn*, 405 U.S. at 341. It protects both new and old residents. *Zobel* v. *Williams*, 457 U.S. ____ (1982).[12] Proof of disparate impact or intentional burdening of the right to travel is not necessary; strict scrutiny

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exists between him and his parents. *Wisconsin* v. *Yoder*, 406 U.S. 205, 231-235 (1972). Respondents have offered no other reason to justify limiting Petitioner's fundamental right to establish a home in the United States. *See Jones* v. *Helms*, 452 U.S. 412 (1981).

[12] Section 21.031(d) burdens not only new residents, but some who have lived in the same school district all of their lives. See e.g. *Plf. Exh.* 8-346 (Application of Rebecca Aguilar) (Rebecca, 15, born in McAllen and lived there with her brother. "Rebecca attended McAllen schools prior to her parent's divorce. Parents have since moved to different areas. Rebecca has done very well in school here and would like to continue attending McAllen schools." — admission denied).

must be applied to any statute which operates to penalize travel whether or not the penalty is intentional. *Dunn* v. *Blumstein*, 405 U.S. at 339; *Memorial Hospital* v. *Maricopa Co.*, 415 U.S. at 258. By arguing that Robert Morales cannot attend school in McAllen, but must instead return to Mexico if he wants an education, R.Brief at 29, Respondents deprieve Roberto of his most basic right as a United States citizen, the right to live in the United States. This burden on his right to travel requires the application of strict scrutiny.

IV. RESPONDENTS HAVE FAILED TO DISTINGUISH *PLYLER* v. *DOE*, 457 U.S. ___ (1982)

Respondents argue that the heightened scrutiny standard in *Plyler* v. *Doe*, 457 U.S. ___ (1982) should not be applied in this case because, unlike the children in *Plyler*, Petitioner is not being punished for his parents' illegal actions but for his own improper motives for moving to McAllen. R.Brief at 28-29. For Texas to suggest that a child of nine has a "primary purpose" or that his thoughts can meaningfully be used to determine his school eligibility ignores reality. Even if the State could determine Roberto's motives, he is no more responsible for the fact that he must live apart from his parents to learn English than the children in *Plyler* were responsible for the circumstances which brought them to the United States.

Furthermore, Respondents' argument that they are punishing Petitioner for his own motives rather than his parents' is inconsistent with Respondents' previous argument that Petitioner has no right to travel because it is his parents who are controlling his decision to travel. The fact that Respondents, themselves, cannot decide whose motive is at issue demonstrates how equivocal and manipulable the motive requirement is.[13] It is nothing more than a device to prevent Petitioner and children like him from attending school.

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[13] Even some of Respondents' "special purpose" cases recognize the uselessness of inquiring into motive as a method of determining

Finally, Respondents suggest that Section 21.031(d) will not produce an underclass of uneducated children as did the statute in *Plyler*, because the children excluded by Section 21.031(d) can attend school where their parents live. The evidence shows that alternative schools are not always available to children excluded by Section 21.031(d).[14] Even assuming that Petitioner could attend school in Mexico, he will not learn English there. He and others like him will return to Texas as adults and will forever be handicapped by their inability to speak English. *Plyler* compels the application of at least heightened scrutiny to Section 21.031(d).[15]

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residence. In *Board of Trustees* v. *Powell*, 140 S.W. 67 (Ky. 1911) the court stated:

> in determining whether a person is or is not a resident in a school district . . ., the usual and ordinary indicia of residence or the absence thereof should be the proper guide, and not the secret mental resolves or concealed intentions of person living, or having lived, in the district.

See also *Gardner* v. *Bd. of Ed.*, 38 N.W. 433, 434 (1888).

[14] See the examples at p. 12, n.6 of Brief for Petitioner.

[15] Whether Texas must admit an undocumented alien child to school in the unlikely event such a child moved to the United States for the purpose of attending school is not raised by this appeal. See *Plyler* v. *Doe*, 457 U.S. at ____, n.5, 102 S.Ct. at 2407 (Powell, J. concurring). Petitioner is a U.S. citizen. Moreover undocumented aliens, unlike Petitioner, have no constitutional right to travel.

V. SECTION 21.031(d) IS NOT RATIONALLY, LET ALONE SUBSTANTIALLY OR NECESSARILY, RELATED TO THE STATE'S INTERESTS

A. Respondents' Claim As To The Numbers Of Children Who Will Establish Homes Apart From Their Parents Are Exaggerated

Respondents argue that Tex. Educ. Code § 21.031(d) is necessary to protect the schools from an influx of thousands of students. Although Respondents stake their argument on this claim and repeatedly invoke the spectre of a flood of new students, Respondents candidly admit in their Brief, at 15 n.16, that there is no way to know how many new children would actually enroll if § 21.031(d) were found to be unconstitutional.

Respondents used this same 'floodgates' argument to justify the exclusion of undocumented aliens from the schools in *Plyler* v. *Doe*, 457 U.S. ____, 50 U.S.L.W. 4650 (1982). In fact, the actual enrollment of undocumented students turned out to be far less than the State had predicted. See N.Y. Times, Sept. 1, 1982, at 8 col. 1. Respondents' claims concerning an influx of citizen children from Mexico are no more reliable.

There is no evidence that striking down § 21.031(d) will lead to district hopping as alleged by Respondents. A parent's decision to give up the day to day care of his child is not easily or frequently made, and even after the decision is made, a willing custodian must be found. These are not insubstantial barriers. This can be seen from the fact that New York, Connecticut, New Jersey, Pennsylvania, Colorado, Kansas, Idaho, and Missouri have for many years allowed children to establish residence with custodians regardless of their motive for doing so, yet these states have apparently not had significant trouble with district hopping.

B. Section 21.031(d) Does Not Promote Desegregation Efforts

Respondents cite *Valley* v. *Rapides Parish School Dist.*, 646 F.2d 925, 934-936, 942-943 (5th Cir. 1981) cert. den. 102 Sup.Ct. 1430 (1982), as support for their claim that § 21.031(d) helps implement desegregation efforts. Respondents imply that requiring children who move for school purposes to obtain a guardianship somehow prevents sham transfers. *Valley* demonstrates just how erroneous that theory is. In *Valley* three children sought to avoid attending school in their parents' attendance zone. They did this by having legal guardians appointed for them in a different zone while they continued to live with their parents. Thus, the court-ordered guardianships acted as the basis for the sham claim of residence rather than as a means of preventing such shams.[16]

C. The Distinctions Drawn By Section 21.031(d) On The Basis Of Motive Are Not Rationally Related To Any Of The Purposes Offered By Respondents

Respondents suggest a number of interests allegedly served by Section 21.031(d) including promotion of local control over the schools, protecting local tax contributions, planning for school expenditures, and assuring that children live with re-

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[16] The claim that Section 21.031(d) furthers desegration goals is not supported by *Jackson* v. *Waco I.S.D.*, 629 S.W.2d 201 (Tex.Civ.App. 1982) either. The court in that case recognized that motive gave no clear guideline for determining residence and therefore required all children to live with parents or legal guardians regardless of their motives.

sponsible adults.[17] However, as Respondents candidly recognize, these interests,

> relate almost exclusively to the problems associated with children living apart from their families and the relative ease with which children can move or be sent around without their families.

R. Brief at 30. As noted above, Petitioner disagrees with the assumption that parents can send their children away with "relative ease" or that the numbers of such children are great enough to cause "problems." However, even assuming that Respondents' interests are served by treating children who live with custodians differently from children who live with their parents, those interests provide no rational explanation for further discriminating between children who live with custodians for school purposes and children who live with custodians for other purposes.

The reason why a child lives with a custodian has no bearing on the degree of interest his custodian shows in local control of the schools. Children who live with custodians for health reasons or because of broken homes contribute no more to the local tax base than children who live with custodians for school purposes.[18] There is no evidence to show that children migrate

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[17] This latter purpose is a red herring. Petitioners custodian is already a legally responsible adult under Texas law. See footnote 9.

[18] Respondents express considerable concern about the tax burden commercial boarding house arrangements would put on the districts where they are located. Prohibiting just those boarding houses whose children have come for educational purposes, as Section 21.031(d) does, is irrational. The establishment of a boarding home for asthmatics would be as much a burden on the tax resources of a district as the establishment of a boarding house for educational reasons. A far less drastic and more effective means of dealing with the problem of commercial boarding homes is to require a resident

more frequently for school purposes than other purposes or that it is more difficult to predict and plan for children who move for one purpose rather than another. Finally, children who live with custodians for school purposes are no more in need of a responsible adult than children who move for some other purpose. Yet, in every one of these cases, Section 21.031(d) denies admission to children who move for the purpose of attending school while allowing custodial children with any other motive to attend school.

Nowhere do Respondents offer any legitimate purpose for treating custodial children differently solely because of their motive. Respondents' only comment is that,

> the distinction drawn between children who reside in a district primarily for educational purposes and those who do so for other purposes is necessary in order to create an exception to the general state policy for children who must live apart from their parents without unnecessarily jeopardizing the State's school system.

R.Brief at 30. This justification amounts to nothing more than a "concise expression of an intention to discriminate." *Plyler* v. *Doe*, 457 U.S. ___, 102 S.Ct. at 2400. The desire to discriminate does not provide even a rationale basis for Section 21.031(d).

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custodian to contribute to the support of the child in order to qualify the child for school. This approach has been adopted by several states, see footnotes 6 and 7 above. Children living in charitable boarding homes are considered residents of those homes. See *Ashley* v. *Bd. of Ed.*, 114 N.E. 20 (Ill. 1916); *Grand Lodge I.O.O.F.* v. *Bd. of Ed.*, 110 S.E. 440 (W.Va. 1922); *Mariadahl Children's Home* v. *Bellegarde*, 180 P.2d 612 (Kan. 1947) (parents contribute to support of child).

VI. CONCLUSION

The judgment of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

EDWARD J. TUDDENHAM
JAMES A. HERRMANN
TEXAS RURAL LEGAL AID, INC.
FARM WORKER DIVISION
Box 2223
Hereford, Texas 79045

Amicus Brief

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NO. 81-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ORALIA MARTINEZ, ET AL.,
PETITIONERS

V.

DR. M. L. BROCKETTE, ET AL.,
RESPONDENTS

ON WRIT OF CERTORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE
TEXAS ASSOCIATION OF SCHOOL BOARDS,
TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS,
AND
TEXAS COUNCIL OF SCHOOL ATTORNEYS

DAVID CRUMP
GULF & GREAT PLAINS LEGAL
FOUNDATION OF AMERICA
SUITE 720
723 MAIN STREET
HOUSTON, TEXAS 77002
(713) 223-9393
ATTORNEY OF RECORD

OF COUNSEL:

TIMOTHY T. COOPER
c/o BRACEWELL & PATTERSON
PENNZOIL BUILDING
HOUSTON, TEXAS 77002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
BRIEF OF AMICI CURIAE	1
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
PRELIMINARY STATEMENT	4
SUMMARY OF ARGUMENT	5
ARGUMENT AND AUTHORITIES	6
I. THE HOLDING OF VLANDIS V. KLINE, THAT THOSE WHO "HAVE COME [TO THE DISTRICT] SOLELY FOR EDUCATIONAL PURPOSES" ARE "NOT, IN FACT, BONA FIDE RESIDENTS," IS APPLICABLE HERE.	6
A. Section 21.031 is declarative of the common law and reflects the same concerns as are reflected in the statutes or decisional law of most other States.	7
B. Residency is a matter of State law, in which the States should have wide latitude in adopting reasonable alternatives, but Petitioners' arguments would result in "federalizing" the law of residency.	9
C. Petitioners' attempt to distinguish Vlandis v. Kline is unpersuasive.	10
II. PETITIONERS' EQUAL PROTECTION ARGUMENT IS UNTENABLE.	11

A. The State's interests underlying 21.031 are sufficiently strong to sustain it under the applicable level of scrutiny. 11

B. Texas should not be required to adopt Petitioners' suggested alternatives, which it rationally regards as less workable. 15

C. Heightened scrutiny is inappropriate because the conditions present in Doe v. Plyler, which involved innocent children deprived of all education by parental wrongdoing, are not present in this case. 16

III. THE STATUTE DOES NOT VIOLATE THE RIGHT TO TRAVEL. 17

IV. ARGUMENTS RESPECTING THE "RIGHT TO CHOOSE FAMILY LIVING ARRANGEMENTS" ARE INAPPOSITE BECAUSE THE STATUTE DOES NOT APPLY WHEN THERE IS A PRIMARY REASON FOR PRESENCE OTHER THAN ATTENDING SCHOOL, INCLUDING A REASON REGARDING FAMILY LIVING ARRANGEMENTS. 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES	Page
Cline v. Knight, 137 P.2d 680 (Colo. 1943)	9
Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1980)	15
Elkins v. Moreno, 435 U.S. 647 (1978)	9
Haverhill v. Gale, 103 Mass. 104 (1869)	9
Lalli v. Lalli, 439 U.S. 259 (1978)	16
In re Marriage of Mehlmauer, 60 Cal. App. 3d 104, 131 Cal. Rptr. 325 (4th Dist. 1976)	13
Mansfield Twp. Bd. of Educ. v. State Bd. of Educ., 101 N.J. 474, 129 A. 765 (1925)	9
Plyler v. Doe, 102 S. Ct. 3282 (1982)	6
State ex rel. School Dist. No. 1 v. School Dist. No. 12, 45 Wyo. 365, 18 P.2d 1010 (1933)	9
San Antonio Indep. Schl. Dist. v. Rodriguez, 411 U.S. 1 (1973)	10
Vlandis v. Kline, 412 U.S. 441 (1973)	5, 6
STATUTES	
Tex. Educ. Code § 21.031(d)	passim
SECONDARY AUTHORITIES	
Annot., Determination of Residence or Nonresidence for the Purpose of Fixing Tuition Fees or the Like in Public School or College, 83 ALR2d 497 (1962)	7
Annot., Desire of a Child as to Geographical Location of Residence or Domicile as a Factor in Awarding Custody or Terminating Parental Rights, 10 ALR 4th 827 (1981)	13
Annot., Nonresidence of Parent as Negativing Residence of Child within School District, 146 ALR 1281 (1943)	9

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amicus Curiae Texas Association of School Boards ("TASB") is a nonprofit association of more than 1100 local boards entrusted with the governance of public schools throughout Texas. Its goals and functions include the dissemination of information among its members, the formulation of public positions upon issues of concern to education, and the improvement of public schools in Texas. The Texas Association of School Administrators is a nonprofit association of school superintendents and administrators throughout the State. The Texas Council of School Attorneys is a similar association of attorneys and counselors for school districts.

All school districts in Texas will be affected by the decision of this case. Furthermore, Amici may be able to assist the Court in developing issues regarding the nationwide impact of the case, because their functions make them aware of educational policy issues in other States. The concerns underlying the Texas law here at issue are similar to those underlying analogous laws in States throughout the nation.

STATEMENT OF THE CASE

Texas Education Code section 21.031(d) provides that a minor cannot effectively establish a residence by himself or herself in a chosen school district "for the primary purpose of attending the free public schools" in that district. Accordingly, this statute provides that if he is present in a district primarily for the purpose of changing schools, "separate and apart from his parent, guardian or other person having lawful control of him under an order of the court," a minor cannot attend school there free of tuition. The statute is merely declarative of the common law.[1] Its concerns are similar to those underlying laws in other States across the nation.[2]

This action is a broad-based challenge to section 21.031(d) on its face. The relief requested by plaintiffs is an injunction against any enforcement of the statute in any situation and a declaration that it is unconstitutional on its face. J. Appendix 3a, 7a (Complaint). At trial, for tactical reasons, plaintiffs expressly stated on the record that they were limiting their attack to the single, across-the-board issue of facial unconstitutionality. J. App. 27a (FF 40). Plaintiffs even filed a motion in limine to exclude any evidence bearing on the application of the statute and to limit all the evidence to facial constitutionality. With the issue thus framed, both the district court and the court of appeals upheld the statute as facially constitutional.

The district court found that the school districts in question were "most liberal" in finding a purpose for the minor's presence that would allow him to attend school. It was the policy of these districts to exclude a student only if there was literally no other reason for his presence than to effect a change of school districts. J. App. 27a (FF 39). Thus a bona fide living arrangement, such

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1 See Argument, part I, infra.

2 Id.

as that occasioned by orphanhood, a broken home, health reasons, or the like, would entitle a minor to establish residence for school purposes. Id. The district court found that the statute applied equally to international transfers, to interstate transfers, and to intrastate transfers (i.e., transfers from one district to another within a state).[3] Id. 25a (FF 27). The record evidence further indicates that the statute is very effective at separating those who have bona fide connection with the district from those who do not.[4] The district court also found that the wholesale invalidation of the statute, sought by Petitioners, would have a number of detrimental effects.[5]

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3 In the year of trial, the statute operated in McAllen to exclude two intrastate transfers (both from Palacios, Texas) and one interstate one within the United States (from Moore, Oklahoma). It also excluded two international transfers (both from Mexico). J. App. 61a. Given the location of McAllen and its commerce patterns, this pattern is entirely in line with the impact one ought to expect. It is persuasive evidence of evenhanded application (although application is not in issue) and of facial nondiscrimination. It is also notable that the plaintiffs below, in the Fifth Circuit, included one whose parents resided in Idaho.

4 The record shows, and the district court found, that most of the plaintiffs who started this action have returned to their true residences or otherwise ceased efforts to enroll. See, e.g., J. App. 24a (FF 19, finding that plaintiff Delia Morales, sister of Petitioner Roberto Morales, had returned to the residence of her parents). The district court found that the two remaining plaintiffs, including both Rita Gomez (whose parents reside in Idaho) and Roberto Morales (whose parents reside in Mexico), intended to remain in the districts solely for the length of time necessary to finish school.

5 In school districts across Texas, the judge found, it would "cause the immediate enrollment of thousands of children" whom their parents would send from other districts to boarding house arrangements. Populations would fluctuate unpredictably, athletic programs would be subject to recruitment and other abuses, facilities and teachers could not be accurately matched to populations, and such social programs as bilingual education would be frustrated. Id. 25a-26a (FF 28-34). Although harm to desegregation programs is not specifically mentioned in the findings, it is readily inferrable from them. Furthermore, the district court found that these child-

Plaintiffs all resided with adults who could have become their lawful guardians or obtained "lawful control" under "an order of a court." As Petitioners' Brief indicates, Plaintiffs have chosen[6] not to do so because of their parental attachment [7] to adults who reside and pay taxes elsewhere. Brief of Petitioners at 13 n.7.

PRELIMINARY STATEMENT

Although they limited their challenge in the trial court, by choice, to an attack on the facial validity of 21.031(d) because of the desire to level a wholesale attack upon it, petitioners have

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ren and their parents would not have a relationship with the local school district such that they would pay any taxes to support the schools. Invalidation would thus dilute local participation in the public schools and would decrease parents' involvement in their children's education. Id. 26a (FF 33).

6 Brief of Petitioners, at 13 n.7, attributes this choice in part to indigency. However, legal services are available to indigents, as this litigation shows; Officials of the Legal Services Corporation handled one and a half million cases last year. Petitioners are thus in a better position to obtain such services than are many persons who are not indigent. Indeed, guardianships or custody orders could have been obtained for all plaintiffs and many others for less than the cost of this suit. It was the desire to obtain a wholesale invalidation of 21.031(d), rather than handle individual cases, that prompted the choice not to attempt to do so. The Texas Statute is more liberal than many in allowing such guardianships to create residency (see Brief of Respondents).

7 Of course, the choice to retain lawful custody in one's parents is not only proper and rational but worthy of encouragement. In the context of this case, however, the choice is indicative of the bona fide state interest in having the child attend school where his parents reside and pay taxes.

It is to be remembered that 21.031(d) applies only in the situation in which the primary reason for the child's presence is to attend one school rather than another. If there is any primary reason, other than attending school, for the child to be in the district, no guardianship or court order would be necessary.

now neglected that limitation in their brief in this Court. The Brief of Petitioners relies heavily upon arguments respecting the particular individual application of the statute to plaintiff Roberto Morales, urging that there is "no reason plaintiff should be the one" to whom 21.031 should be applied. Brief of Petitioners at 8. Indeed, arguments respecting the application of the statute, rather than its facial constitutionality, are woven into Petitioners' arguments throughout the brief.

The question whether 21.031, if facially unconstitutional, is unconstitutional as applied to Roberto Morales is not presented by this case because of Petitioners' choice to eliminate that argument. Consequently, the sole question before this Court is whether the statute should be invalidated for all applications and for all States that might have similar requirements.

SUMMARY OF ARGUMENT

I.

The holding of Vlandis v. Kline, 412 U.S. 441 (1973), that those who "have come [to the district] solely for educational purposes" are "not, in fact, bona fide residents," is applicable to this case. The Texas statute is merely declarative of the common law and expresses concerns similar to those underlying residence legislation or case law in most States. Petitioners' effort to distinguish Vlandis is unpersuasive.

II.

Petitioners' equal protection argument is untenable. The State's interests include (1) having a schoolchild reside with a legally responsible adult, (2) limiting public welfare expenditures to those with a real relationship with the state, (3) promoting identity of the local populace with the school, (4) avoiding transfers that would allow persons to take advantage of high-quality school programs without residence or tax payment, (5) preventing the creation of an incentive for migratory child-custody battles, and (6) defining a workable policy respecting school assignment for desegregation, athletics, special education and

similar purposes. These interests are sufficiently strong to satisfy any applicable level of scrutiny.

Heightened scrutiny, however, is inappropriate because the conditions present in Plyler v. Doe, 457 U.S. , 50 U.S.L.W. 4650 (1982), which involved innocent children deprived of all education by parental wrongdoing, are not present here.

III.

The statute does not infringe the right to travel because it is not a durational residency requirement. Furthermore, it does not "deter interstate migration;" it merely ensures that a State will not undertake expenditures to support the migrant unless the interstate migration is bona fide. A requirement that a schoolchild reside with a legally responsible adult, or alternatively have a reason for presence other than obtaining the benefits of a bona fide residence, does not violate the right to travel.

IV.

The statute applies only in the event the primary reason for the living arrangement is school attendance. Therefore, it does not apply if the student has a different primary reason, such as "family privacy," for the living arrangement. Thus the "family privacy" argument of Amicus Curiae ACLU is inapposite.

ARGUMENT AND AUTHORITIES

I. THE HOLDING OF VLANDIS V. KLINE, THAT THOSE WHO "HAVE COME [TO THE DISTRICT] SOLELY FOR EDUCATIONAL PURPOSES" ARE "NOT, IN FACT, BONA FIDE RESIDENTS," IS APPLICABLE HERE.

In Vlandis v. Kline, 412 U.S. 441, 453-54 (1973) (emphasis added), the Court made the following statement, which is dispositive of this case:

> The state can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

This statement says no more and no less than what section 21.031(d) says. Furthermore, both 21.031(d) and Vlandis v. Kline are consistent with the traditional, common-law approach to residence.

A. *Section 21.031 is declarative of the common law and reflects the same concerns as are reflected in the statutes or decisional law of most other States.*

Petitioners treat this Texas statute as though it were unique and as though its concerns were of recent origin. Such is not the case. In fact, section 21.031 is declarative of the common law and reflects traditional concepts of residence. For example, one text writer has written as follows:

> On the other hand, it has also been generally recognized that mere superficial residence in the [school] district, obtained for the sole or primary purpose of taking advantage of the school facilities therein, will not ordinarily entitle the child in question to school privileges.

Annot., Determination of Residence or Nonresidence for the Purpose of Fixing Tuition Fees or the Like in Public School or College, 83 ALR2d 497 (1962) (emphasis added). This Annotation, which reflects the then-existing law of various States from Maine to California, pre-dates the enactment of section 21.031 (d) by many years. Thus 21.031(d) is declarative of long-established common law and is similar in its concerns to those underlying law generally in effect in the States nationwide.

Petitioners' efforts to treat the statute as somehow unique or improper are inapposite.[8]

Indeed, the principle appears to trace back to time immemorial. As another writer has written,

> A child living apart from its parents is not to be considered as having residence for school purposes in the school district in which it lives where the residence is temporary or where the child is placed in the school district primarily that it may attend school there.

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8 Throughout Petitioners' Brief, 21.031(d) is attacked as discriminatory against Hispanics. The statute was proposed by a Mexican-American state senator, Senator Longoria; it was sponsored in the Texas House of Representatives by a Mexican-American legislator, Rep. Torres; and it was adjudicated constitutional by a Mexican-American United States District Judge, Judge Reynaldo Garza, now a Judge of the Fifth Circuit. J. App. 27a, 59a, 69a. If the statute discriminated against their ethnic heritage, that fact appears to have eluded these three officials.

The traditional and historical origins of 21.031(d) are clear and have nothing to do with discrimination. The statement of the principle underlying 21.031(d) as generally applicable common law in the Annotations cited above, likewise, has nothing to do with discrimination. It is true that school districts contiguous to Mexico are concerned about commuter students from Mexico, but that concern has nothing to do with discrimination by these school districts, which are themselves largely Hispanic; that is where their commuter students would naturally come from, just as in any other State following law similar to 21.031, the law is in place to prevent commuter students who are likely to come from contigous areas. This statute applies to exclude interstate, intrastate and interstate applicants who do not qualify. See note 3 supra. The use of this argument by Petitioners is an indication that an accusation of discrimination has great power to besmirch even if it is unproven and indeed untrue.

A final reason for rejecting this tactic of Petitioners was given by the Fifth Circuit, which said: "We do not address this question because discriminatory application is not alleged in the amended complaint." J. App. 44a.

Annot., Nonresidence of Parent as Negativing Residence of Child within School District, 146 ALR 1281 (1943) (emphasis added); Cline v. Knight, 137 P.2d 680 (Colo. 1943), reprinted in Id. The Texas statute, even down to its phraseology (which uses the same "primary purpose" test for validity of residence), is declarative of this generally recognized, long-standing law.

One of the concerns of courts and legislatures dating back at least to the time of the cases cited in these Annotations was the phenomenon of boarding house arrangements by which parents could choose a high-quality school district and send their children to live in that district, much as one might choose a private school such as Andover or Choate. By choosing a high quality public school, rather than Andover or Choate, such a parent could avoid both tuition and taxes to support the high-quality district. It is quite clear from the number of such cases that the boarding-house concern was a real one. The later Annotation contains a section specifically directed to "Boarding Houses." Annot., supra, 83 ALR2d at 519. See, e.g., Haverhill v. Gale, 103 Mass. 104 (1869) (parents who sent children into Massachusetts district to boarding-house arrangement for purposes of attending school not entitled to have child attend tuition-free); Mansfield Twp. Bd. of Educ. v. State Bd. of Educ., 101 N.J. 474, 129 A. 765 (1925) (same); State ex rel. School Dist. No. 1 v. School Dist. No. 12, 45 Wyo. 365, 18 P.2d 1010 (1933) (child sent by parents to boarding house but who regularly returned home, where boarding house arrangement was solely for purpose of attending different school, did not establish school residence). Petitioners' broad-based, wholesale attack on the statute would invalidate its application even to these situations.

B. *Residency is a matter of State law, in which the States should have wide latitude in adopting reasonable alternatives, but Petitioners' arguments would result in "federalizing" the law of residency.*

In Elkins v. Moreno, 435 U.S. 647 (1978), this Court recognized the truism that the definition of residence is, in the first instance, a matter of state law, and that federal concerns are at

issue only in the extraordinary case in which a State's definition violates the Constitution. States should, and do, have wide latitude in selecting definitions of residency that are reasonable.

Petitioners' arguments would change that authority, with intrusions so deep and widespread as to federalize the law of school residency. As the Brief of Respondents shows, the States have a variety of statutes, but most States impose the requirements found in section 21.031(d) or their equivalent; furthermore, several States have tightened their requirements in recent years to address peculiar local concerns. Ironically, many such state statutes are more stringent than Texas' section 21.031(d). For example, as Respondents' Brief shows, a number of States define a child's residence solely with reference to his parent or guardian, and they do not on their face allow residence to be set up by the child himself even if there is a primary motive other than that of changing schools. Petitioners' arguments would thus do violence to a wide variety of sensible and reasonable state residency definitions.

C. *Petitioners' attempt to distinguish Vlandis v. Kline is unpersuasive.*

Petitioners argue that college education is less important than elementary and secondary education, and that, therefore, residency requirements that are properly enforceable in college situations under Vlandis should not be enforceable as to elementary and secondary education. Brief of Petitioners at 25. The reasoning of Vlandis is devoid of support for this position and applies with equal force here. In fact, the distinction, if there is one, should cut the other way. Identity of the local taxpaying populace with their districts' elementary and secondary schools is the traditional means of support of local schools. It is the key to excellence in such education. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Colleges do not depend for support on close local residents and have much less need of identity with or involvement of them. Similarly, parental involvement in elementary and secondary education is essential, and there is a strong interest in having a child in the

McAllen School District reside with a legally responsible adult. There is no such interest in the case of a college student at the University of Texas. In summary, the application of residence criteria such as that expressed in section 21.031 is actually more appropriate in the case of elementary and secondary schools than in the case of college, contrary to Petitioners' argument.[9]

II. PETITIONERS' EQUAL PROTECTION ARGUMENT IS UNTENABLE.

The district court held that "normal" equal protection analysis was applicable to the statute and that consequently only a rational basis was required, rather than "heightened" or "strict" scrutiny. J. App. 28a-29a. The Fifth Circuit, however, held that the interests underlying this statute were sufficiently strong to sustain it under any level of review, including strict scrutiny. J. App. 45a. Both analyses are correct.

A. *The State's interests underlying 21.031 are sufficiently strong to sustain it under the applicable level of scrutiny.*

(1) The interest in limiting public education, welfare, and similar expenditures to residents having a real and lasting relationship to the State.

This Court has repeatedly held, even in situations in which it was applying strict or heightened scrutiny, that the States are entitled to use "traditional" tests of bona fide residence for such matters as elementary and secondary education. Thus in Plyler v. Doe, 102 S.Ct. 3282, 2400 n.22 (1982), the Court said that a

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9 Petitioners also attempt to distinguish the college tuition cases in that the penalties imposed by durational residency requirements "are only of limited duration." This distinction is also unpersuasive, because 21.031(d) does not impose any penalty, limited or unlimited, on bona fide residents who move for reasons other than free education. Indeed, the college tuition cases impose both a durational residency requirement and the requirement of 21.031(d); 21.031(d), of course, imposes only the latter.

State could, "under traditional criteria, bar a person from obtaining domicile within a State" and could require that families "comply with established standards by which the State historically tests residence." The Court went on to hold, "The counties of the State are as free to apply . . . established criteria for determining residence as they are to apply those criteria to any other child who seeks admission." Id.

(2) The interest in ensuring that a schoolchild resides with a legally responsible adult having long-term responsibility for and interest in his education.

There has been a disturbing tendency in recent times to regard elementary and secondary education as something that takes place only between a child and a school district, not involving a legally responsible adult. Nothing could be more untrue or more harmful to the cause of education. Involvement of a legally responsible adult, whose stable and responsible care is a major part of the child's moral compass, basic cognitive concepts, speech patterns, and cultural education, is just as important as, if not more important than, a good school. Many school districts have made strenuous efforts recently to increase parental involvement by such programs as the Houston Independent School District's successful Operation Fail-Safe, which enhanced the likelihood that parents would ensure performance by the children of whom they had lawful control. Every lawyer is likely to remember the experience of having his report card signed by a parent or guardian; the long-term, continuing, and stable lawful responsibility of the parent or guardian was what gave this otherwise minor ceremony an important place in the educational system. Section 21.031(d) supports these interests by enhancing the likelihood that a mere preference for changing schools will not remove the child from the company of an adult having actual legal responsibility for his or her care.

Nor is education made up only of avoiding failure. Involvement of adults whose concern is limited to boarding-house arrangements in field trips, extracurricular activities or even con-

sent to medical treatment would be ambiguous in the absence of section 21.031(d).

(3) The interest in a workable approach to the complexities of migratory divorce, custody or runaway situations.

If Petitioners' argument is correct, and if a schoolchild can indeed establish a school residence on his or her own, States would experience vastly increased difficulties in dealing with the already intractable problems of migratory divorce, child custody and runaways. For example, in In re Marriage of Mehlmauer, 60 Cal. App.3d 104, 131 Cal. Rptr. 325 (4th Dist. 1976), the pupil expressed a desire to remain in California with his father's new family rather than return to Texas with his mother and stepfather, largely because of a wish to escape the stricter discipline of his stepfather, including his educational preferences, and obtain more personal freedom. The court properly rejected this view. See generally Annot., Desire of a Child as to Geographical Location of Residence or Domicile as a Factor in Awarding Custody or Terminating Parental Rights, 10 ALR 4th 827 (1981).

A State has an interest in avoiding the use of its educational facilities or other public expenditures to promote the separation of children from the adults comprising their families or to frustrate court orders. [10]

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10 Contrary to Petitioner's argument, this interest does not threaten the right to "family privacy." The concern is that there be a lawfully responsible adult; section 21.031(d) does not limit that person to any particular family relationship. Furthermore, as is shown in section IV infra, 21.031(d) comes into play only when there is no "family privacy" interest to be impaired, because it is limited to situations in which a change of schools is the primary motive. Indeed, 21.031(d) protects family privacy, because it insures against the breakup of families for school purposes. A state has a right so to structure its public welfare expenditures as to avoid their becoming an incentive to antisocial consequences.

(4) The interest in avoiding transfers by persons desiring to take advantage of high-quality school programs without residence or tax payment.

As is shown in section I of this Brief, supra, one reason for the historical adoption of the common law principle embodied in 21.031(d) was the number of cases in which parents sent their children to boarding arrangements for the sole purpose of taking advantage of a different school district than the one in which they resided and paid taxes. Today, the perceived quality of education varies greatly from place to place, and the population is more mobile. A significant percentage of parents already send their children to private boarding schools. The growth of programs such as special education for handicapped children, particularly mentally handicapped ones, together with the wide variation in quality of such programs, already places irresistible pressures upon parents to place children in boarding arrangements. Such a practice, if widespread, would not only undermine local fiscal responsibility for a district's schools but would also cause an influx of boarding pupils into districts having excellent special education programs.

Petitioners' argument, if accepted, would make commercial boarding arrangements, formed for the purpose of enabling parents to change their children's schools to a district containing an excelling education system without the inconvenience of paying taxes to support it, economically viable and legally unassailable. Petitioners have characterized this situation as one presenting "fraud," and under current law, which includes 21.031, that characterization is true; if Petitioners' argument were accepted, however, the "fraudulent" residence would be constitutionally protected and the legitimate state interests at stake could be easily frustrated without the need for resort to fraud.

(5) The interest in promoting local identity with, responsibility for, and concern with local schools.

As is indicated in San Antonio Indep. School Dist. v. Rodriguez, supra, the traditional means of financing public

schools is through local taxes, at least in part. This method of financing is salutary because those who benefit from the public schools are thus responsible for their quality and are motivated to ensure that quality is high. Section 21.031 promotes this interest.

(6) The interest in a workable policy respecting school assignment for desegregation, athletics, special education, and similar purposes.

This Court is undoubtedly aware of the pressures some parents feel in districts subject to desegregation decrees including large-scale pupil reassignment. Many succumb to the inducement to move to other districts or to place their children in private schools. See Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1980) (separate opinion of Mr. Justice Powell). Currently, stability of residential patterns provides some hedge against these phenomena, but under the argument posed by Petitioners, and in the absence of 21.031(d), parents would have readily available and constitutionally protected means of sending their children to school districts in which accomodating friends or relatives resided. Similarly, the Houston Independent School District, like other school districts, has been called upon to oppose attendance under pupil living arrangements undertaken for the purpose of transferring athletic teams. Special education is a frequent interdistrict issue, upon which the State is seriously in need of a principle such as 21.031(d). In all of these situations, the statute provides a clear, workable basis for pupil assignment. This benefit would disappear if, under Petitioners' argument, a minor could himself choose his residence for the sole purpose of choosing his school district.

B. *Texas Should Not Be Required to Adopt Petitioners' Suggested Alternatives, Which It Rationally Regards as Less Workable.*

Petitioners' Brief at 31-38 suggests a variety of alternatives that Petitioners argue Texas could have adopted instead of 21.031(d). For example, it is suggested that Texas could instead

define residence by intent to remain permanently or indefinitely or by intent not to return to some other place. This definition would be unsatisfactory because it would fence out the family present in McAllen for bona fide reasons, but present for a temporary period of time. A migrant worker, present in the United States under a temporary employment permit, would not be able to enroll his children in the public schools under this approach suggested by Petitioners. Furthermore, this suggested approach would not address most of the concerns set forth as state interests above if it were interpreted, as Petitioners suggest, to allow a schoolchild to move to a district solely to change schools. It is submitted that 21.031(d) is, in fact, well targeted to serve the legitimate interests of the State set forth above.

C. *Heightened scrutiny is inappropriate because the conditions present in Doe v. Plyler, which involved innocent children deprived of all education by parental wrongdoing, are not present in this case.*

The level of scrutiny applied in Plyler v. Doe, supra, was explained by two factors: first, the absence of individual fault or autonomous action by the children in question, who were disadvantaged by actions undertaken by their parents, whom it was assumed they could not control; and secondly, the finding that the children were deprived of all education. Schoolchildren subject to 21.031(d) are, by definition, not living with their parents or under their control. Nor are they absolutely deprived of an education; the assumption underlying section 21.031(d) is that they have entered the district for the primary purpose of changing from one school system to another. If they wish to accomplish even this result, they can do so under the relatively liberal Texas statute by obtaining guardianship or a lawful order of custody in the adult with whom they will live. The argument that this latter requirement is so burdensome as to constitute an "absolute" deprivation is not only unpersuasive on its face but contrary to such decisions of this court as Lalli v. Lalli, 439 U.S. 259 (1978). In Lalli, the Court upheld a New York law forbidding an illegitimate child from inheriting through his father unless paternity had been established during the father's lifetime by judicial decree. The Court concluded that this law did not

"effect a total statutory disinheritance." Neither does a requirement of lawfully established guardianship or custody, in the absence of parental presence or other reason for attending this particular school rather than another, constitute a "total statutory disinheritance" from education.

III. THE STATUTE DOES NOT VIOLATE THE RIGHT TO TRAVEL.

21.031 does not impose a durational residency requirement. Bona-fide migration entitles a family to send its children to school in the district not after a durational-residency delay, but immediately. All of the cases cited by Petitioners in which the right to travel was held infringed involved durational residency requirements that penalized the new arrival. A requirement that a schoolchild reside with a legally responsible adult, or in the alternative that he have some reason for absence from the adults legally responsible for him other than the desire to change schools, does not penalize interstate migration.

IV. ARGUMENTS RESPECTING THE "RIGHT TO CHOOSE FAMILY LIVING ARRANGEMENTS" ARE INAPPOSITE BECAUSE THE STATUTE DOES NOT APPLY WHEN THERE IS A PRIMARY REASON FOR PRESENCE OTHER THAN ATTENDING SCHOOL, INCLUDING A REASON REGARDING FAMILY LIVING ARRANGEMENTS.

Amicus curiae ACLU argues that 21.031(d) violates the asserted "fundamental right to freedom of choice in family living arrangements." Brief of Amicus Curiae at 26. This broad assertion of a fundamental right cannot be justified in the present situation from the cases there cited, but the most compelling argument against the assertion is that this statute does not infringe any such interest irrespective of whether it is a fundamental right. 21.031 applies only in the situation in which the reason for the minor's presence is to attend one school rather than another. It does not apply to any other primary reason,

including family living arrangements. Thus it does not infringe any right to choose family living arrangements.

CONCLUSION

The opinion of the court of appeals should be affirmed and the statute upheld.

Respectfully submitted,

David Crump
Professor of Law,
South Texas Law School
c/o Gulf & Great Plains Legal
Foundation of America
723 Main St., Suite 720
Houston, Texas 77002
(713) 223-9393
Attorney of Record

Timothy T. Cooper
Bracewell & Patterson
Pennzoil Building
Houston, Texas 77002
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have, prior to filing this Brief, served three (3) copies each upon all counsel of record by depositing such copies in a United States Post Office, namely the Central Post Office at Houston, Texas, first class postage prepaid, addressed to: James A. Herrmann, Texas Rural Legal Aid, Inc., 305 E. Jackson, Suite 206, Harlingen, Texas 78550; Travis Hiester, Atlas & Hall, P.O. Drawer 3725, McAllen, Texas 78501; and Richard Arnett, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711; all in accordance with Rule 28.3 of the Rules of this Court.

Docket Sheet

NO. 81-857-CFX	TITLE Oralia MARTINEZ, as Next Friend of Roberto Morales, Petitioner v. Raymon L. Bynum, etc., et al.

DOCKETED	COURT
Nov. 7, 1981	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: James A. Herrmann
	Counsel for Respondents: Travis Dade Hiester
Nov. 7, 1981	Petition for writ of certiorari filed. (Record filed).
Dec. 9, 1981	Brief for the respondents in opposition filed.
Dec. 16, 1981	DISTRIBUTED. 1-8.
June 14, 1982	REDISTRIBUTED. 6-17.
June 21, 1982	Petition GRANTED.

July 19, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Aug. 25, 1982.
Aug. 25, 1982	Brief for petitioners' Oralia Martinez, et al. filed.
Aug. 25, 1982	Joint appendix filed.
Aug. 27, 1982	Brief, amicus curiae, of the American Civil Liberties Union, et al. in support of petitioner filed.
Sept. 13, 1982	Motion of respondents for divided argument filed.
Sept. 24, 1982	Order extending time to file the respondents' brief on the merits until Oct. 12, 1982.
Oct. 4, 1982	The motion of respondents for divided argument is DENIED.
Oct. 13, 1982	Brief, amici curiae, of Texas Association of School Boards, et al. filed.
Oct. 14, 1982	Brief for the respondents filed.
Nov. 5, 1982	CIRCULATED.
Jan 3, 1983	Reply brief for petitioner, Oralia Martinez, etc. filed.
Jan. 10, 1983	ARGUED.